

Michael R. Lazerwitz (*pro hac vice*)
Jeremy J. Calsyn (State Bar No. 205062)
Lee F. Berger (State Bar No. 222756)
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 974-1500 (Phone)
(202) 974-1999 (Facsimile)
mlazerwitz@cgsh.com

Attorneys for Defendants LG Display Co., Ltd. and LG Display America, Inc.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

**IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION**

CASE NO. M: 07-1827 SI
MDL. NO. 1827

This Document Relates To:

**DEFENDANTS' OPPOSITION TO
INDIRECT PURCHASER PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION**

ALL INDIRECT PURCHASER ACTIONS

FILED UNDER SEAL

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1 **STATEMENT OF THE ISSUES TO BE DECIDED**

- 2 1. Whether the proposed state damages classes should be certified under Federal Rule of
3 Civil Procedure 23(b)(3) in light of the individual issues of subject matter jurisdiction,
4 impact, and conspiracy, as well as the manageability of adjudicating alleged damages
5 claims.
- 6 2. Whether plaintiffs' proposed class definitions are sufficiently ascertainable to permit the
7 Court and absentee persons to determine which consumers are part of the proposed
8 classes under Rule 23(a).
- 9 3. Whether plaintiffs, who allege a conspiracy ending at the latest in December 2006, have
10 established the necessary threat of future harm to certify a nationwide injunctive class
11 under Rule 23(b)(2).
- 12 4. Whether plaintiffs' state unjust enrichment claims are secondary to their proposed
13 federal nationwide injunctive claim under Rule 23(b)(2).
- 14 5. Whether named plaintiffs Gladys Baker, William Fisher, Judy Griffith, Chad Hansen,
15 Ling Hahn Jou, Martha Mulvey, Christopher Murphy, Ben Northway, Jai Paguirigan,
16 Kou Srimoungchanh, and Robert Watson are typical of the proposed class members and
17 otherwise adequate to represent absent class members under Rules 23(a)(3) and
18 23(a)(4).

19 **INTRODUCTION AND SUMMARY OF ARGUMENT**

20 Indirect purchaser plaintiffs ("plaintiffs") seek to certify 23 statewide damages
21 classes and a nationwide injunctive class comprised of tens of millions of end-users who
22 allegedly purchased, over at least an eight-year period, televisions, monitors, and notebook
23 computers containing TFT-LCD panels (collectively "LCD Products") defendants
24 manufactured. In doing so, plaintiffs have alleged consumer classes that contain many
25 unknowns and unknowables. The breadth, complexity, and uncertainty of plaintiffs' 24
26 proposed classes render them uncertifiable under Rule 23.

1 First, none of plaintiffs' 23 proposed statewide damages classes satisfies Rule
 2 23(b)(3)'s predominance and manageability requirements. Plaintiffs cannot establish subject
 3 matter jurisdiction, impact, damages, or the existence of a conspiracy with evidence applicable
 4 to all class members. Any one of these deficiencies defeats their motion.

5 *Subject Matter Jurisdiction:* As a threshold matter, the Court should not certify
 6 any of plaintiffs' proposed classes because each class includes claims over which the Court
 7 lacks subject matter jurisdiction. Plaintiffs' proposed classes include claims based on purchases
 8 of both products containing TFT-LCD panels defendants sold directly into the United States
 9 ("Domestic-Panel Products") and products containing panels defendants initially sold overseas
 10 ("Foreign-Panel Products"). But unlike purchasers of Domestic-Panel Products, purchasers of
 11 Foreign-Panel Products must satisfy the Foreign Trade Antitrust Improvement Act's ("FTAIA")
 12 demanding jurisdictional test. The FTAIA bars those purchasers' claims because the overseas
 13 panel sales (*i.e.*, defendants' conduct) did not have a direct effect on U.S. commerce and any
 14 domestic effect of the alleged anticompetitive conduct did not give rise to the Foreign-Panel
 15 Product purchasers' claims. Any attempt to prove otherwise would require individualized
 16 inquiries that could not be resolved through common evidence. Plaintiffs' proposed classes
 17 thus create predominance and manageability problems because they have not proposed a
 18 method of identifying who is and is not subject to the FTAIA's jurisdictional bar.

19 *Impact:* Plaintiffs fail to establish that impact can be shown through common
 20 proof on a classwide basis. Plaintiffs disregard the fact that the complex nature of the LCD
 21 panel and products markets – their many distribution channels, intermediaries' varying market
 22 and negotiating power, the varied uses of LCD panels in many types of LCD Products, changes
 23 in the LCD markets over time, LCD panels' numerous customized features, and the value added
 24 by each intermediary – does not lend itself to calculating in a systematic or formulaic manner
 25 the overcharge (if any) passed on to plaintiffs. Instead, plaintiffs rely on their expert, Dr. Netz,
 26 who offers an impact analysis nearly identical to that which Judge Alsup rejected as "fatally
 27 flawed" in *In re Graphics Processing Units Antitrust Litigation*, 253 F.R.D. 478, 507 (N.D. Cal.
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1 2008) (“*GPU*”). *GPU* involved indirect purchaser classes of end-users that purchased graphics
 2 cards through complex distribution channels that rival the complexity of the distribution
 3 channels in the LCD panel industry. Once again, “Dr. Netz has presented no class-wide
 4 formulae that would be reliable in assessing impact on each consumer” in light of “the large
 5 number of manufacturers, resellers, and products at issue here,” and “does not adequately
 6 explain how her regressions would be applied on a class-wide basis.” *Id.* at 504. Rather, Dr.
 7 Netz again bases her conclusions on regression analyses that suffer from “serious analytical
 8 problems” because they rely on global averages rather than disaggregated transactions, thus
 9 hiding the “substantial variation across individual cases.” *Id.* at 494 (citation omitted). Besides
 10 repeating her previous analytical mistakes, Dr. Netz’s methods suffer from inconsistencies in
 11 the formulae applied to different customers, a flawed direct overcharge analysis, and reliance on
 12 data based on competitive periods that are inconsistent with plaintiffs’ allegations.

13 Accordingly, plaintiffs cannot show predominance on the issue of impact.

14 *Damages:* Plaintiffs have not proposed a manageable method for calculating
 15 damages. Plaintiffs’ proffered “fluid recovery” method is impermissible in the Ninth Circuit
 16 and further problematic here due to its reliance on Dr. Netz’s flawed impact analysis and lack of
 17 necessary data. To calculate plaintiffs’ damages (if any) properly, one must account for
 18 differences in bargaining power, discounts, local market conditions, the variety of products
 19 involved, and other relevant variables, which would require a separate mini-trial for each class
 20 member, rendering the class action unmanageable under Rule 23(b)(3).

21 *Conspiracy:* Plaintiffs have not substantively alleged that a single conspiracy
 22 affected all class members. As plaintiffs allege and the government has admitted, there were a
 23 number of separate conspiracies involving different defendants, customers, and types of panels
 24 – not a single, overarching one. This is not surprising, because the nature of the LCD panel
 25 industry makes an effective, single, eight-year, all-encompassing conspiracy virtually
 26 impossible. Plaintiffs’ proposed classes are so broad as to include purchasers allegedly injured

1 by different putative conspiracies, which by definition makes it impossible to prove the
 2 existence of a conspiracy on the basis of evidence common to the class.

3 Second, the proposed classes are insufficiently defined, making notice
 4 impossible under Rule 23(a). Rule 23(a) requires that a class be ascertainable, so that the Court
 5 knows who should receive the notice, and each recipient knows whether he is a member of the
 6 class. Under plaintiffs' proposed class definitions, a person or entity is a member of a class if
 7 that person or entity purchased LCD panels indirectly "from one or more named Defendants."
 8 But plaintiffs have neither identified such purchasers (as distinguished from purchasers of LCD
 9 Products containing non-defendants' panels) nor offered a method for doing so. And it is
 10 unlikely plaintiffs would be able to develop such a method, given the enormous volume of
 11 information involved in tracing the panel in each indirect purchaser's LCD Product back to the
 12 panel manufacturer.

13 Third, plaintiffs fare no better under Rule 23(b)(2). Because plaintiffs admit that
 14 the alleged conspiracy ended in 2006 and do not allege the requisite threat of future harm from
 15 any "ongoing conspiracy," they lack standing to obtain injunctive relief – a prerequisite to class
 16 certification under Rule 23(b)(2). The Court should also refuse to certify plaintiffs' proposed
 17 statewide classes under Rule 23(b)(2) based on their state law unjust enrichment claims,
 18 because such monetary claims are not secondary to plaintiffs' claim for injunctive relief.

19 Finally, at least eleven named plaintiffs cannot adequately protect the absentee
 20 class members' interests under Rules 23(a)(3) and 23(a)(4). Some of these plaintiffs are not
 21 class members and are subject to unique defenses, rendering them atypical. Others are
 22 inadequate because they have inappropriate business or familial relationships with their
 23 counsel, suggesting that they may put their attorneys' interests before the classes' interests.

24 **STATEMENT OF FACTS**

25 The Court is already familiar with this case and the overall nature of the LCD
 26 panel industry. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1113-14
 27 (N.D. Cal. 2008); Defs.' Joint Opp. to Direct Purchaser Pls.' Mot. for Class Certification at 3-

1 16, Dkt. No. 1077 (filed July 1, 2009) (“Defs.’ Direct Purchaser Class Opp.”). This section
 2 discusses only those additional facts pertinent to the proposed indirect purchaser classes.

3 **I. PROPOSED CLASS DEFINITIONS**

4 Plaintiffs seek to certify a nationwide indirect purchaser class for injunctive relief
 5 and 23 state indirect purchaser classes for damages. Pls.’ Mem. of Points and Authorities in
 6 Supp. of Indirect-Purchaser Pls.’ Mot. for Class Certification, 1-2 (June 2, 2009) (“Pls.’ Mem.”).
 7 Each of the 23 state classes is defined identically, except that each applies only to the state the
 8 specific named plaintiff seeks to represent. *Id.* Plaintiffs seek to represent purchasers of three
 9 types of LCD Products: televisions, computer monitors, and notebooks. *Id.* at 2-3. Unlike the
 10 direct purchaser plaintiffs, plaintiffs seek to represent only the final consumers of these LCD
 11 Products; the proposed classes specifically exclude resellers. *Id.*

12 The operative complaint specifies a “Class Period” extending from January 1,
 13 1996, through December 11, 2006. Pls.’ Second Consol. Am. Compl. ¶¶ 1, 15, 128 (December
 14 5, 2008) (“Compl.”). This ending date was the day when various investigations of price-fixing
 15 in the LCD panel industry, including the U.S. Department of Justice’s investigation, were
 16 publicly announced. *See id.* ¶ 183. But plaintiffs’ class certification motion proposes class
 17 periods beginning on January 1, 1999, and extending until “the present” (for the nationwide
 18 Class) or until December 31, 2006 (for the statewide classes). Pls.’ Mem. at 2-3.

19 **II. DISTRIBUTION CHANNELS FOR LCD PANELS AND PRODUCTS**

20 LCD panels may be incorporated into LCD Products by any one of several
 21 entities, and they may be resold (by themselves or as components) several times before reaching
 22 the final purchaser.¹ Intermediaries between defendants and final purchasers include, among

23 ¹ To be incorporated into particular customers’ LCD Products, LCD panels are typically
 24 customized to match the specific features required by different LCD Products’ designs.
 25 *See* [REDACTED]

26 Decl. of Marshall Pinder in Supp. of Defs.’ Joint Opp. to Direct Purchaser Pls.’
 27 Mot. for Class Certification, Dkt. No. 1106, at ¶ 5 (“Pinder Decl.”); [REDACTED]

1 others, Original Equipment Manufacturers (“OEMs”), Original Design Manufacturers
 2 (“ODMs”), systems integrators, contract manufacturers, electronic parts distributors, resellers,
 3 and retailers. Expert Report of Edward A. Snyder, Ph.D. ¶¶ 64, 112-13 (“Snyder Decl.”). Each
 4 intermediary may add value by, among other things, combining an LCD panel with other
 5 components to make a finished product. *Id.* ¶ 119.

6 For example, one distribution chain could be as follows. An LCD panel
 7 manufacturer sells an LCD panel to an overseas electronic parts distributor that resells the panel
 8 to an overseas contract manufacturer. *See Min Decl.* ¶ 23.² That contract manufacturer might
 9 assemble the panel into a notebook and then sell the notebook to a PC OEM’s overseas
 10 subsidiary. *See Min Decl.* ¶ 22. This PC OEM might then sell this notebook to a U.S. retailer,
 11 who in turn would sell the finished LCD Product to a final consumer. *See id.* ¶ 24. However,
 12 this potential distribution chain may diverge at any given point. For instance, the LCD
 13 manufacturer may instead sell the panel directly to the contract manufacturer or to the PC OEM
 14 instead of to the electronic parts distributor. *See id.* ¶ 21.³ The PC OEM could also sell the
 15 assembled notebook to a reseller or to the final consumer directly. *See Min Decl.* ¶ 24.

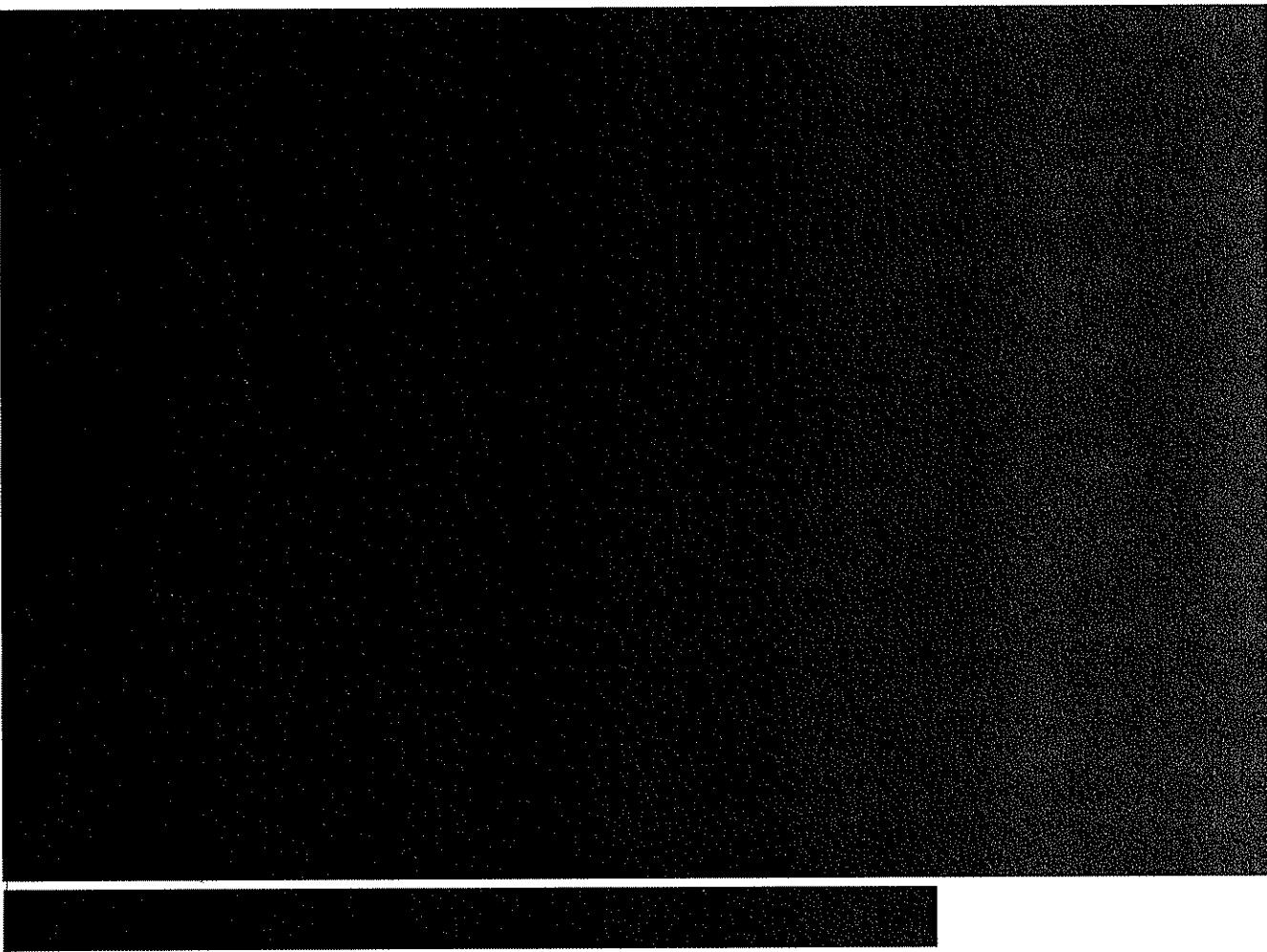
16 The diagram below illustrates the many distribution channels through which
 17 LCD panels may pass before reaching end-users.



25 ² *See also* Decl. of Joyce Pan in Supp. of Opp. to Direct Purchaser Pls.’ Mot. for Class
 Certification, Dkt. No. 1113, at ¶ 4 (“Pan Decl.”); Yamada Decl. ¶ 4.
 26

27 ³ *See also* [REDACTED] Yamada Decl. ¶ 4.
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17 **ARGUMENT**

18 **I. CLASS CERTIFICATION STANDARDS**

19 “[F]or a class action to be certified, the plaintiffs must establish the four
20 prerequisites of Fed.R.Civ.P. 23(a) and at least one of the alternative requirements of
21 Fed.R.Civ.P. 23(b).” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Rule
22 23(a) requires plaintiffs to demonstrate that (1) the class is so numerous that joinder of all
23 members is impracticable; (2) questions of law or fact are common to the entire class; (3) the
24 plaintiff representatives’ claims and defenses are typical of the claims and defenses of the entire

25



1 class; and (4) the plaintiff representatives will fairly and adequately protect the class's interests.
 2 Fed. R. Civ. P. 23(a). Additionally, as "a threshold matter, and apart from the explicit
 3 requirements of Rule 23(a), the party seeking class certification must demonstrate that an
 4 identifiable and ascertainable class exists." *Mazur v. eBay Inc.*, No. 07-03967, 2009 WL
 5 1203937, at *4 (N.D. Cal. May 5, 2009).

6 To certify a Rule 23(b)(3) class for monetary relief, plaintiffs also must show
 7 "that the questions of law or fact common to class members predominate over any questions
 8 affecting only individual members, and that a class action is superior to other available methods
 9 for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Alternatively,
 10 to certify a Rule 23(b)(2) class for injunctive relief, plaintiffs must show that defendants have
 11 acted on grounds that apply generally to the class, so that final injunctive relief is appropriate.
 12 Fed. R. Civ. P. 23(b)(2).

13 This Court should conduct a "rigorous analysis" before certifying a class. *Gen.
 14 Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982). Such a rigorous analysis should
 15 include, where necessary, "consider[ing] the merits of the claims to the extent that [they are]
 16 related to the Rule 23 analysis." *Vinole v. Countrywide Home Loans, Inc.*, No. 08-55223, 2009
 17 WL 1926444, at *6, 10 n.15 (9th Cir. July 7, 2009) (concluding that the district court did not err
 18 in "analyzing the merits of the underlying claims," because often the "pleadings alone will not
 19 resolve the question of class certification") (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
 20 509 (9th Cir. 1992)). The Court "need not blindly rely on conclusory allegations" in the
 21 complaint. *Jordan v. Paul Fin., LLC*, No. 07-04496, 2009 WL 192888, at *2 (N.D. Cal. Jan.
 22 27, 2009) (Illston, J.) (citation omitted).

23 In performing this rigorous analysis, the Court may weigh each side's class
 24 certification evidence to determine whether plaintiffs can satisfy every element of Rule 23. *In
 25 re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008); *In re Initial Pub.
 26 Offering Sec. Litig.*, 471 F.3d 24, 27, 40-42 (2d Cir. 2006); *In re Xcelera.com Sec. Litig.*, 430
 27 F.3d 503, 512 (1st Cir. 2005); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 322-23 (5th Cir. 2005);
 28

1 *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); *Gariety v. Grant Thornton, LLP*,
 2 368 F.3d 356, 366 (4th Cir. 2004); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th
 3 Cir. 2001); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984); *accord In re Live Concert*
 4 *Antitrust Litig.*, 247 F.R.D. 98, 115 (C.D. Cal. 2007) (explaining that, but for the Ninth
 5 Circuit's decision in *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007) (later vacated by
 6 556 F.3d 919, and granting the petition for hearing en banc), the court would have followed the
 7 *Initial Pub. Offering* standard). As such, contrary to plaintiffs' intimation, this Court should
 8 "weigh the relative credibility" of parties' opposing experts and their evidence before certifying
 9 the classes. *Compare In re Hydrogen Peroxide*, 552 F.3d at 322 (holding that the district court
 10 erred by not weighing the relative credibility of the parties' experts); *with Pls.' Mem.* at 9, 22
 11 (suggesting that the Court should not engage in a weighing of competing evidence).⁵ Where, as
 12 here, plaintiffs' expert has not properly analyzed the relevant facts, the Court should disregard
 13 that expert's submission and deny certification. *See, e.g., Somers v. Apple, Inc.*, -- F.R.D. --,
 14 No. 07-06507, 2009 WL 2137148, at *8 (N.D. Cal. July 17, 2009) (denying certification in
 15 antitrust case because the court found "the overall testimony of [defendant's expert] far more
 16 persuasive than that of [plaintiff's expert]"); *Weisfeld v. Sun Chem. Corp.*, 84 F. App'x 257,
 17 262 (3d Cir. 2004).

18 **II. NO RULE 23(B)(3) CLASSES SHOULD BE CERTIFIED BECAUSE COMMON
 19 ISSUES DO NOT PREDOMINATE OVER INDIVIDUALIZED ISSUES AND A
 CLASS ACTION WOULD NOT BE MANAGEABLE**

20 The state damages classes should not be certified because plaintiffs cannot show
 21 that "questions of law or fact common to class members predominate over any questions
 22 affecting only individual members." Fed. R. Civ. P. 23(b)(3). Here, plaintiffs must
 23

24 5 When analyzing expert testimony, the Court should bear in mind that any opinions of
 25 plaintiffs' experts are not facts and cannot meet the Rule 23 requirements when
 26 unsupported by evidence. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509
 U.S. 209, 242 (1993) (explaining that "[e]xpert testimony is useful as a guide to
 interpreting market facts, but it is not a substitute for them").

1 demonstrate that common questions predominate as to whether: (i) there was a conspiracy to fix
 2 prices in violation of the antitrust laws; (ii) the alleged violations caused plaintiffs injury –
 3 “impact”; and (iii) the injury can be identified. *Atl. Richfield Co. v. USA Petroleum Co.*, 495
 4 U.S. 328, 339-41 (1990). Plaintiffs incorrectly assert that the Court should assume
 5 predominance simply because this is an antitrust case. *See* Pls.’ Mem. at 20-21. To the
 6 contrary, the Court should assess whether “individual issues will overwhelm the common
 7 questions and render the action valueless.” *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326,
 8 339 (E.D. Mich. 2001); *see also In re Hotel Telephone Charges*, 500 F.2d 86, 89 (9th Cir.
 9 1974) (reversing class certification; “[plaintiffs’] allegations that a conspiracy existed to violate
 10 the antitrust laws does not insure that common issues will predominate”).

11 Plaintiffs contend that their claims are premised on a ““shared factual predicate’
 12 – Defendants’ conspiracy,” and that common evidence needed to prove that conspiracy
 13 predominates over all other issues. *See* Pls.’ Mem. at 21.⁶ Putting aside plaintiffs’ failure to
 14 show the existence of a single conspiracy involving all defendants (*see infra* Argument § II.D),
 15 the cases on which plaintiffs rely do not hold that common proof of a conspiracy is sufficient to
 16 overcome plaintiffs’ inability to show subject matter jurisdiction, impact, or damages on a
 17 classwide basis. *See In re Abbott Labs. Norvir Antitrust Litig.*, No. C 04-1511, 2007 WL
 18 1689899, at *9 (N.D. Cal. June 11, 2007) (granting class certification of unjust enrichment class
 19 only after finding that plaintiffs had demonstrated that impact and damages could be shown
 20 through common proof); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 275, 280-87 (D. Mass.
 21 2004) (dismissing state monopolization class claims based on lack of common evidence of

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 23
 24 6 *In re Napster Copyright Litigation*, on which plaintiffs rely, Pls.’ Mem. at 21, does not
 25 address the question of whether plaintiffs satisfy Rule 23(b)(3) solely by establishing that
 26 common proof exists with respect to a single issue – the existence of conspiracy. *Napster*
 27 is a copyright case that does not have the separate conspiracy and impact requirements that
 28 exist in antitrust cases. *See In re Napster Copyright Litig.*, No. C MDL-00-1369, 2005
 WL 1287611, at *7 (N.D. Cal. June 1, 2005).

1 impact); *In re Sugar Indust. Antitrust Litig.*, 73 F.R.D. 322, 346-48 (E.D. Pa. 1976) (granting
 2 certification only after finding that plaintiffs could show impact through common evidence).

3 The Court should therefore examine each element of plaintiffs' claims to
 4 determine whether the individual inquiries necessary to establish them will overwhelm any
 5 common issues, such that certifying a class renders the action "valueless" or otherwise
 6 eliminates the benefits of the class action mechanism. *In re Cardizem*, 200 F.R.D. at 339. The
 7 Court must be assured that a sufficient number of the case's issues predominate across the
 8 classes so that the case does not result in hundreds of thousands of individual trials after the
 9 limited common issues have been resolved. *In re Methionine Antitrust Litig.*, 204 F.R.D. 161,
 10 165 (N.D. Cal. 2001) ("*Methionine I*"). Furthermore, plaintiffs must propose some way to
 11 address all issues: if their case plan addresses common issues first without explaining how
 12 individual issues will be resolved, then litigation over the common issues will be a waste of
 13 time and resources. *See GPU*, 253 F.R.D. at 507 (denying class certification where
 14 individualized inquiries would be required because indirect purchaser plaintiffs did not show a
 15 common method of proving impact); *Somers*, 2009 WL 2137148, at *8 (same).

16 A. **Plaintiffs Cannot Establish Subject Matter Jurisdiction Through Evidence**
 17 **Common To The Class**

18 Plaintiffs' proposed classes include purchasers who allegedly bought: (i) Foreign-
 19 Panel Products (finished products incorporating panels defendants sold overseas); and (ii)
 20 Domestic-Panel Products (finished products incorporating panels defendants sold directly into the
 21 United States). Those putative class members who base their claims on purchases of Foreign-
 22 Panel Products face a unique and significant jurisdictional hurdle under the FTAIA, because they
 23 purchased LCD Products containing panels originally sold in foreign commerce.⁷ To satisfy the
 24

25 7 Plaintiffs who purchased Domestic-Panel Products face a different jurisdictional test under
 26 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) ("*Alcoa*"). *See*
 27 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (affirming the continued
 applicability of *Alcoa*). For the purposes of this motion, defendants assume, without

1 FTAIA, Foreign-Panel Product purchasers must show that defendants' conduct involving non-
 2 import foreign commerce: (1) had a "direct, substantial and reasonably foreseeable effect" on
 3 U.S. domestic or import commerce; and (2) that effect gave rise to their claims. 15 U.S.C. § 6a;
 4 *F. Hoffman La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004). Plaintiffs fail to meet
 5 this burden through common proof; therefore they ask this Court to certify classes that include
 6 claims over which it lacks subject matter jurisdiction. The Court should not do so. Plaintiffs
 7 cannot remedy this defect by asking the Court simply to exclude claims over which it lacks
 8 jurisdiction, because they have not proposed a means of identifying who among them must (or in
 9 fact does) satisfy the FTAIA. Moreover, any attempt by plaintiffs to demonstrate that certain
 10 purchases of Foreign-Panel Products somehow fall within the jurisdictional scope of the FTAIA
 11 would necessarily devolve into complex, individualized inquiries that could not be resolved
 12 through common evidence.

13 1. Most Panels That Eventually Reach The United States In A Finished
 14 Product Are First Sold In Foreign Markets And Proceed Through
Many Different Distribution Levels And Distribution Channels

15 Defendants manufacture LCD panels exclusively outside the United States.
 16 They typically ship the panels either (a) directly to independent ODMs or to contract
 17 manufacturers that incorporate the panels into finished products for OEMs or (b) directly to
 18 OEM assembly subsidiaries.⁸

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 _____
 24 conceding, that the Court may have subject matter jurisdiction over claims brought by
 plaintiffs who purchased Domestic-Panel Products.

25 8 Min Decl. ¶ 21; [REDACTED] Snyder Decl. ¶ 64.
 26 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 The timing of LCD panels' entry into the United States varies, sometimes even
20 for the same customer or the same LCD product.
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 Foreign-Panel Products sold into the United States fall into in at least three
26 distinct product groups: televisions, notebooks, and monitors. Furthermore, Foreign-Panel
27 Products entered the United States at all distribution channel levels: sometimes at the OEM
28

1 level, sometimes at distributor levels, sometimes at retailer levels, and sometimes directly at
 2 consumer levels.
 3 [REDACTED]
 4 [REDACTED]

5 2. Under The FTAIA, The Court Lacks Subject Matter Jurisdiction Over
Claims Based On Purchases Of Foreign-Panel Products

6
 7 Under the FTAIA, there is no subject matter jurisdiction over Foreign-Panel
 8 Product purchasers' claims. *See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942,
 9 952 (7th Cir. 2003) (en banc) (whether a plaintiff satisfies the FTAIA is an issue of subject
 10 matter jurisdiction); Order Denying Indirect Purchasers Pls.' Mot. for Preliminary Injunction,
 11 Dkt. No. 630, at 2 (holding that the Court lacks subject-matter jurisdiction under FTAIA to
 12 enjoin joint venture in Japan). First, the FTAIA "lays out a general rule" that excludes from
 13 U.S. antitrust laws "conduct involving trade or commerce (other than import trade or
 14 commerce) with foreign nations." *Empagran*, 542 U.S. at 161-62 (*quoting* 15 U.S.C. § 6a).
 15 Therefore, the FTAIA applies only to foreign commerce, *i.e.*, transactions between overseas
 16 sellers and buyers, and not to import commerce, *i.e.*, transactions between foreign sellers and
 17 U.S. buyers. *Compare Krumman v. Christie's Int'l*, 284 F.3d 384, 395 (2d Cir. 2002) ("When
 18 there is conduct directed at reducing the competitiveness of a foreign market . . . such conduct
 19 involves foreign trade or commerce"), *abrogated in part on other grounds by Empagran*, 542
 20 U.S. at 173, *with Turicentro v. Am. Airlines*, 303 F.3d 293, 303-04 (3d Cir. 2002) (describing
 21 import commerce as defendant conduct that involves "directly bring[ing] items or services into
 22 the United States"). Whether the FTAIA applies is determined based on the defendant's
 23 conduct; it is irrelevant whether a third party sold the product into U.S. commerce or whether a
 24 plaintiff purchased the product in U.S. commerce. *Krumman*, 284 F.3d at 395; *Carpet Group*
 25 *Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 71 (3d Cir. 2000).

26 In this case, the FTAIA applies to those plaintiffs and putative class members
 27 who purchased Foreign-Panel Products, because the initial panel sale from an overseas

1 defendant facility to an overseas purchaser (which is where any alleged overcharge would have
 2 originated) involved only foreign commerce, not import commerce. In contrast, claims based
 3 on purchases of Domestic-Panel Products are not subject to the FTAIA because a defendant's
 4 conduct involved import commerce (*i.e.*, a defendant shipped the panel directly into the United
 5 States from abroad) or domestic commerce (*i.e.*, a defendant's U.S. subsidiary shipped the
 6 panel to a U.S. customer).

7 Second, the FTAIA "brings such conduct back within the . . . reach" of domestic
 8 antitrust laws only if the conduct "both (1) sufficiently affects American commerce, *i.e.*, it has a
 9 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or
 10 (certain) export commerce, and" (2) that effect "gives rise" to the plaintiffs' antitrust claims.
 11 *Empagran*, 542 U.S. at 163 (*quoting* 15 U.S.C. § 6a). An effect is "direct" under the FTAIA
 12 only if it is the "*immediate consequence* of the defendant's activity." *United States v. LSL*
 13 *Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (*emphasis added*). In *LSL Biotechnologies*,
 14 the Ninth Circuit closely examined the legal definition of "direct" in the FTAIA, defining
 15 "direct" as "proceeding from one point to another in time or space without deviation or
 16 interruption." *Id.* (*citation omitted*). The Ninth Circuit further relied on "the Supreme Court's
 17 interpretation of a nearly identical term in the Foreign Sovereign Immunities Act," regarding
 18 which "the Supreme Court unanimously declared that an effect is 'direct' if it follows as an
 19 immediate consequence of the defendant's activity." *Id.* (*citation omitted*).

20 Here, the only "immediate consequences" of the alleged conspiracies were
 21 foreign effects experienced by direct purchasers of LCD *panels* from defendants.¹⁰ Foreign-

22
 23 10 This is not to say that direct purchasers of panels would necessarily have a claim under the
 24 Sherman Act. Foreign direct purchasers' claims would be barred for the same reason that
 25 the claims of U.S. indirect purchasers of Foreign-Panel Products are – they cannot
 26 overcome the FTAIA's jurisdictional hurdle and show that defendants' conduct had a
 27 "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Moreover,
 under *In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir.
 2008) ("DRAM II"), foreign direct purchasers' claims would fail for a separate reason:

1 Panel Product purchasers' alleged injury – paying higher prices for Foreign-Panel Products –
 2 occurred well downstream and in completely different product markets from the markets in
 3 which defendants' alleged anticompetitive conduct took place. Therefore, defendants' foreign
 4 conduct had, at most, an indirect effect on domestic commerce.

5 Courts have held that antitrust plaintiffs cannot show a direct effect on U.S.
 6 commerce based on alleged anticompetitive conduct affecting inputs first sold in foreign
 7 markets. *See, e.g., In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 456-
 8 57 (D. Del. 2007) ("Intel IP") (dismissing U.S. indirect purchasers' claims that they paid higher
 9 prices for products incorporating Intel microprocessors, where Intel's alleged anticompetitive
 10 conduct occurred abroad); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F. Supp. 2d 1003,
 11 1014 (N.D. Ill. 2001) ("The FTAIA explicitly bars antitrust actions alleging restraints in foreign
 12 markets for inputs . . . that are used abroad to manufacture downstream products . . . that may
 13 later be imported into the United States. Clearly, the domestic effects in such a case, if any,
 14 would obviously not be 'direct,' much less 'substantial' and 'reasonably foreseeable.'"), *aff'd*,
 15 322 F.3d 942 (7th Cir. 2003) (en banc); *Papst Motoren GMbH v. Kanematsu-Goshu (U.S.A.),*
 16 Inc., 629 F. Supp. 864, 869 (S.D.N.Y. 1986) (concluding that counter-defendant's manufacture
 17 and sale of products in Japan did not have "direct, substantial and reasonably foreseeable effect
 18 on import trade in the United States," even though products were "eventually sold in [the U.S.]
 19 (presumably through [an intermediary])"). The Court therefore lacks subject matter jurisdiction
 20 over the claims of plaintiffs or putative class members who purchased Foreign-Panel Products.

21 Furthermore, to the extent the alleged conspiracies had an effect on import sales
 22 of LCD panels, *i.e.* the sale of Domestic-Panel Products, Foreign-Panel Product purchasers
 23 cannot show that any such effect gave rise to *their* claims. Courts applying the FTAIA have
 24 consistently held that an effect will not "give rise to" a plaintiff's claim unless the effect on the

25
 26 they would likely not be able to show that any effect on the U.S. commerce from
 27 defendants' conduct proximately caused their (alleged) foreign injury.
 28

1 target commerce is the “proximate” or direct cause of the particular plaintiff’s injury. *See, e.g.*,
 2 *DRAM II*, 546 F.3d at 989. Foreign-Panel Product purchasers simply cannot show a direct
 3 causal connection between any purported effect on the sale of Domestic-Panel Products and
 4 their purchases of Foreign-Panel Products that did not contain imported LCD panels. *See, e.g.*,
 5 *Empagran S.A. v. F Hoffman-LaRoche, Inc.*, 417 F.3d 1267, 1270-71 (D.D.C. 2005).

6 3. Individual Issues Of Fact And Law Predominate Over Common Ones
 7 With Respect To Subject Matter Jurisdiction

8 The Court may not certify plaintiffs’ proposed classes because they include
 9 claims over which it lacks subject matter jurisdiction. *See Sanders v. Apple, Inc.*, No. C 08-
 10 1713, 2009 WL 150950, at *11 (N.D. Cal. Jan. 21, 2009) (“[N]o class may be certified that
 11 contains members lacking Article III standing . . . The class must therefore be defined in such a
 12 way that anyone within it would have standing.”) (quoting *Denney v. Deutsche Bank AG*, 44
 13 F.3d 253, 264 (2d Cir. 2006)); *see also In re Parmalat Securities Litig.*, No. 04 MD 1653
 14 (LDK), 2008 WL 3895539, at *2 (S.D.N.Y. Aug. 21, 2008). Nor can plaintiffs solve this
 15 problem by dividing the proposed classes into groups of Foreign-Panel Product purchasers and
 16 Domestic-Panel Product purchasers. Plaintiffs have not offered a classwide means for sorting
 17 the purported class members into these two groups,¹¹ and it would be virtually impossible to do
 18 so. Tracing each panel from its initial sale down the distribution chain to each alleged class
 19 member presents insurmountable logistical challenges, because it would require collecting data
 20 stretching back many years from thousands of third-party manufacturers, distributors, and
 21 retailers around the world and millions of U.S. consumers. [REDACTED]

22 [REDACTED] That much of this information is overseas, outside the subpoena power of any U.S. court,

23
 24 11 Plaintiffs cannot circumvent the issue by asserting that every member of the proposed
 25 class can satisfy the heightened FTAIA standard, because this approach would: (a)
 26 introduce a class conflict (by subjecting Domestic-Panel Product purchasers to a
 heightened burden solely for the benefit of Foreign-Panel Product purchasers) and (b) not
 address the individualized inquiries necessary under the FTAIA to show that the impact on
 the relevant finished product market was substantial.
 27
 28

1 would further complicate the tracing. Indeed, plaintiffs have had more than a year to gather
 2 evidence about downstream sales, and have served subpoenas on sixty-one third-parties thus
 3 far, yet are not close to having collected the necessary data to trace every panel sale on which
 4 they base their claims. If the Court certifies any of the proposed classes without a classwide
 5 method of sorting the putative class members or necessary classwide evidence, it will have to
 6 repeat the same individualized inquiry – whether the putative class member purchased a
 7 finished product that incorporated a panel first sold abroad – many times over to determine the
 8 threshold question of subject matter jurisdiction.¹²

9 Furthermore, even if it were possible for a direct sale into foreign commerce to
 10 give rise to a “direct, substantial, and reasonably foreseeable effect” in domestic commerce, the
 11 Court would still have to engage in individualized inquiries to determine whether any given
 12 Foreign-Panel Product purchaser can overcome the jurisdictional bar. Despite their burden to
 13 do so, plaintiffs have not offered any method or evidence to show that they can meet their
 14 burden under the FTAIA on a classwide basis. Nor could they. Because televisions, notebooks,
 15 and monitors each comprise a separate product market, *see* Netz Decl. at 12, the Court would
 16 have to look at different economic evidence to determine whether the defendants’ alleged
 17 foreign conduct directly and substantially affected each respective market. And for each
 18 product, plaintiffs would have to show that the effect was direct, substantial, and reasonably
 19 foreseeable at *every* level of distribution between the defendant and the class member. For
 20 example, a putative class member who purchased a monitor directly from Dell’s website would
 21 be affected very differently (if at all) by defendants’ conduct as compared to someone who
 22 purchased an Acer notebook from Best Buy, because this latter purchase is several steps further

23 12 While defendants maintain that the FTAIA bars all claims based on purchases of Foreign-
 24 Panel Products, the Court need not resolve the merits of subject matter jurisdiction on this
 25 motion. It is proper to deny class certification on the basis that common issues of law and
 26 fact do not predominate over individual ones with respect to subject matter jurisdiction, as
 27 Foreign-Panel Products purchasers (unlike Domestic-Panel Products purchasers) will have
 28 to overcome this difficult jurisdictional barrier.

1 removed from defendants' alleged conduct, is in a different product market, and is subject to
 2 different considerations. [REDACTED] Even at the *same* distribution channel
 3 level, the directness, substantiality, and foreseeability of the effect often differ. [REDACTED]

4 Resolving the issue of subject matter jurisdiction would require the Court to
 5 engage in millions of mini-trials, precisely what the predominance requirement is intended to
 6 prevent. *Methionine I*, 204 F.R.D. at 165. Indeed, as part of the predominance determination,
 7 Rule 23(b)(3) expressly directs courts to evaluate "the likely difficulties in managing a class
 8 action." Here, a class action is not manageable because the Court would have to engage in an
 9 extraordinary number of individualized inquiries just to resolve the *threshold* issue of subject
 10 matter jurisdiction over class members' claims. *See, e.g., Burkhalter Travel Agency v.*
 11 *MacFarms Int'l, Inc.*, 141 F.R.D. 144, 152 (N.D. Cal. 1991) (explaining that it is proper to deny
 12 class certification where a court determines that a class action would be unmanageable).

13 4. The FTAIA Bars Antitrust Claims Brought Under State Law

14 By enacting the FTAIA, Congress sought to establish a "single, clear standard"
 15 for the extraterritorial application of American antitrust laws to "promote certainty in assessing
 16 the applicability of American antitrust law to international business transactions and proposed
 17 transactions." H.R. Rep. No. 97-686 at 6, 8 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487,
 18 2491, 2493. As the Supreme Court recognized, comity was the central principle underlying the
 19 statute; by enacting a uniform, national standard, Congress intended that American antitrust law
 20 would only regulate extraterritorial conduct that had a substantial effect on U.S. commerce,
 21 thereby respecting other sovereigns' economic interests. *See Empagran*, 542 U.S. at 167-69.

22 Allowing state antitrust laws to trump the FTAIA would undermine both
 23 uniformity and comity, resulting in divergent jurisdictional tests, with each state imposing its
 24 own test in addition to that under federal law. Such a scenario would disrupt Congress's
 25 express goals in enacting the FTAIA. Accordingly, courts have recognized that state antitrust
 26 claims must satisfy the FTAIA. *See Intel II*, 476 F. Supp. 2d at 457 ("Congress has spoken
 27 under the FTAIA. . . . Congress'[s] intent would be subverted if state antitrust laws were

1 interpreted to reach conduct which the federal law could not.”); *see also Amarel v. Connell*, 202
 2 Cal. App. 3d 137, 150 (1988) (reconciling the FTAIA and the Cartwright Act by concluding
 3 that the FTAIA imposes its “effects” test on state antitrust laws); Louis Altman & Maria
 4 Pollack, *Callmann on Unfair Competition, Trademarks and Monopolies* § 27:30 (4th ed. 2009)
 5 (explaining that “state antitrust laws are subject to the same limitations that are imposed on
 6 federal antitrust laws by” the FTAIA).

7 That the FTAIA does not expressly preempt contrary state law is of no
 8 consequence. Federal law preempts state law where compliance with both federal and state rules
 9 is impossible or where state law “stands as an obstacle to the accomplishment and execution of
 10 the full purposes and objectives of Congress.” *Crosby v. Nat'l Foreign Trade Council*, 530 U.S.
 11 363, 372-73 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 132, 142-43 (1941)). These
 12 principles apply with particular force in areas of foreign commerce, which is “pre-eminently a
 13 matter of national concern.” *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

14 In *Japan Line*, the Supreme Court held that California violated the Commerce
 15 Clause by imposing an *ad valorem* tax on foreign-owned cargo containers. *Id.* at 452-53. The
 16 Court reasoned that, ““with respect to foreign intercourse and trade the people of the United States
 17 act through a single government with unified and adequate national power.”” *Id.* at 448 (quoting
 18 *Bd. of Trustees v. United States*, 289 U.S. 48, 59 (1933)). “[A] state tax on instrumentalities of
 19 foreign commerce may frustrate the achievement of federal uniformity in several ways,” most
 20 notably by “plainly prevent[ing] the Nation from ‘speaking with one voice’ in regulating foreign
 21 commerce.” *Id.* at 450-51. For these reasons, the Court struck down California’s tax, even though
 22 there was no express federal law to the contrary. *Id.* at 452-53.

23 Similarly, if plaintiffs here proceed with state antitrust claims where the FTAIA
 24 would bar federal antitrust claims, the United States could not speak with a single voice on an
 25 important dimension of foreign commerce – the extent to which American antitrust law may
 26 reach foreign conduct. But unlike in *Japan Line*, where Congress was silent on the tax issue,
 27 plaintiffs’ claims here also conflict with a federal statute. Congress enacted the FTAIA with the

1 express purpose of defining the extraterritorial scope of American antitrust law, and in so doing,
 2 identified precisely that conduct which American antitrust law reaches and that which it does
 3 not. Allowing each state independently to determine whether certain foreign conduct violates
 4 its antitrust laws would undermine that purpose. The Supremacy Clause and the Commerce
 5 Clause cannot tolerate such discord.

6 Furthermore, most states either incorporate the FTAIA standard as a matter of
 7 state law, *see, e.g.*, *CSR Ltd. v. Cigna Corp.*, 405 F. Supp. 2d 526, 552 (D.N.J. 2005); *Amarel*,
 8 202 Cal. App. 3d at 150, or interpret state antitrust and consumer protection laws consistently
 9 with federal law (including the FTAIA).¹³ It makes no difference whether states have adopted
 10 *Illinois Brick* repealer statutes, because the FTAIA does not prohibit indirect purchaser claims.
 11 Rather, the FTAIA only establishes a jurisdictional test that applies to claims (whether brought
 12 by direct or indirect purchasers) based on certain foreign conduct.

13 **B. Plaintiffs Cannot Show That Common Issues Will Predominate Because**
 14 **They Cannot Prove Antitrust Impact With Common Evidence**

15 To establish predominance, plaintiffs must show, through common evidence,
 16 antitrust impact (*i.e.*, injury) on each member of the proposed classes. *See, e.g.*, *Bell Atl. Corp.*
 17 *v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (“[W]e have repeatedly held that where fact
 18 of damage cannot be established for every class member through proof common to the class,

20 ¹³ *See, e.g.*, D.C. Code § 28-4515 (2009); Fla. Stat. § 542.23 (2008); Haw. Rev. Stat. § 480-3
 21 (2008); Iowa Code § 553.2 (1999); Me. Rev. Stat. Ann. tit. 5, § 207 (2007); Mass. Gen.
 22 Laws ch. 93, § 1 (2009); Mich. Comp. Laws § 445.784(2) (2009); Nev. Rev. Stat. §
 23 598A.050 (2009); N.M. Stat. Ann. § 57-1-15 (2008); R.I. Gen. Laws § 6-36-2(b) (2009);
 24 S.D. Codified Laws § 37-1-22 (2009); 9 Vt. Stat. Ann. tit. 9, § 2453(b) (2008); W. Va.
 25 Code § 47-18-16 (2008); *Wedgewood Inv. Corp. v. Int'l Harvester Co.*, 126 Ariz. 157, 160
 (1979); *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987);
 26 *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980); *Anheuser-*
Busch, Inc. v. Abrahms, 71 N.Y.2d 327, 334-35 (1988); *Rose v. Vulcan Materials Co.*, 282
 N.C. 643, 655 (1973); *Byre v. Chamberlain*, 362 N.W.2d 69, 74 (S.D. 1985); *Tennessee ex*
rel. Leech v. Levi Strauss & Co., 1980-2 Trade Cas. (CCH) ¶ 63,558 at 76,972 n.2 (Tenn.
 Ch. Ct. 1980); *Grams v. Boss*, 97 Wis. 2d 332, 346 (1980).

1 the need to establish antitrust liability for individual class members defeats Rule 23(b)(3)
 2 predominance.”).¹⁴ Plaintiffs misguidedly assert that “the overriding need to prove antitrust
 3 conspiracy in the LCD panel market is alone sufficient to satisfy the Rule 23(b)(3)
 4 ‘predominance’ requirement” and common questions of impact are “not required for class
 5 certification.” Pls.’ Mem. at 22, 24.¹⁵ Such an approach, which would require certification of a
 6 class in *every* antitrust class action where a common conspiracy is alleged, is not the law.¹⁶

7 The actual rule is straightforward: plaintiffs bear the burden of showing through
 8 common proof that every class member paid a higher price than he would have absent the
 9 alleged conspiracy. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 19
 10 n.18 (1st Cir. 2008); *Blades*, 400 F.3d at 570. In an indirect purchaser class action, “plaintiffs
 11 must demonstrate that defendants overcharged their direct purchasers for [LCD panels] *and* that
 12 those direct purchasers passed on the overcharges to plaintiffs. In so doing, they must find a

13
 14 14 To address impact, plaintiffs rely on federal case law under general federal antitrust
 standards. *See* Pls.’ Mem. at 16, 20-21, 22-24. Except as otherwise noted, defendants
 shall do the same. *See GPU*, 253 F.R.D. at 482, 501-07 (relying on federal case law to
 analyze impact requirement and denying certification of numerous state subclasses).

15 15 Plaintiffs rely on *In re Citric Acid Antitrust Litigation*, where Judge Smith concluded that
 plaintiffs had presented a classwide method for proving impact. No. 95-1092, 1996 WL
 655791, at *8 (N.D. Cal. Oct. 2, 1996) (citing *In re Potash Antitrust Litig.*, 159 F.R.D.
 682, 693-96 (D. Minn. 1996)). In both *Citric Acid* and *Potash*, the courts concluded that
 plaintiffs had proffered methods for showing impact on a classwide basis. *Id.* As a result,
 these cases are not instructive where, as here, plaintiffs have failed to offer a sufficient
 method for showing impact through evidence common to the proposed classes.

16 16 Plaintiffs repeatedly cite cases under various state laws permitting the use of “generalized
 proof” to demonstrate classwide impact. *See generally* Pls.’ Mem. at 31-48. “Generalized
 proof” does not mean that plaintiffs can presume impact on a classwide basis; instead, it
 merely means that plaintiffs can represent a class if they can offer a method to show
 impact on a classwide basis generally, as opposed to requiring individual proof. *E.g.*,
 California v. Infineon Techs. AG, No. C 06-4333, 2008 WL 4155665, at *5 (N.D. Cal.
 Sept. 5, 2008); *Blades*, 400 F.3d at 569-70. Thus, this “generalized proof” standard is the
 same as the federal impact analysis under Rule 23(b)(3). *Nichols v. Mobile Bd. of
 Realtors, Inc.*, 675 F.2d 671, 676 (5th Cir. 1982) (Rule 23(b)(3) requires a showing that
 issues subject to “generalized proof” predominate over issues subject to “individualized
 proof”); *Methionine I*, 204 F.R.D. at 163, 166.

1 way to account for the decision-making of a variety of resellers and manufacturers.” *GPU*, 253
 2 F.R.D. at 499 (emphasis added); *Methionine I*, 204 F.R.D. at 164.

3 Here, plaintiffs’ impact analysis ignores key characteristics of the LCD panel
 4 industry and how these characteristics changed over the putative class period: (i) complex chains of
 5 manufacturing and distribution; (ii) different degrees of market power and business know-how of
 6 the intermediaries and consumers; (iii) complex and rapidly changing products; (iv) customization
 7 of LCD panels for numerous products; and (v) varying amounts of value added by manufacturers to
 8 LCD Products. The LCD panel industry’s complexity makes it extraordinarily difficult, if not
 9 impossible, to trace any alleged overcharge through to indirect purchasers on a classwide basis.
 10 [REDACTED]
 11 [REDACTED]

12 In addition, Dr. Netz has presented no classwide formulas that would reliably assess impact on
 13 each end-user in the putative classes. Instead, her flawed regression analyses (i) rely on average
 14 – rather than disaggregated – LCD panel prices; (ii) use different variables for different
 15 regressions; (iii) ignore price variation both across models and within a model; and (iv) rely on
 16 competitive periods that are inconsistent with plaintiffs’ allegations.

17 1. Plaintiffs Have Not Proposed A Sufficient Method To Establish
 Common Injury In Light Of The Complex LCD Distribution Channels

19 Courts properly deny class certification under Rule 23(b)(3) where the relevant
 20 product is sold through many different intermediaries in complex distribution channels that give
 21 rise to too many considerations to be accounted for in a single, classwide method. *See, e.g., In*
 22 *re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997) (“Tracing
 23 a price hike through successive resales is an example of what is called ‘incidence analysis,’ and
 24 is famously difficult.”). Varied intermediaries face costs, incentives, and other market forces
 25 that differently affect their ability and willingness to pass along any cost increase. *Methionine*
 26 *I*, 204 F.R.D. at 165 (rejecting generic pass-through allegations where resellers “operate[d] in
 27 different markets with different competitive pressures”). Without a common method that

1 accounts on a classwide basis for the pricing decisions of each intermediary involved in each
 2 putative class member's LCD Product purchase, a court would have to analyze for each
 3 purchase all the individual pricing decisions by every reseller at each level of the distribution
 4 chain, defeating the point of a class action. *GPU*, 253 F.R.D. at 505 ("Class certification is
 5 problematic where a plaintiff's method of proving pass-through requires a reseller-by-reseller
 6 analysis."); *In re Brand Name Prescription Drugs*, No. 94-C-897, 1994 WL 663590, at *7
 7 (N.D. Ill. Nov. 18, 1994) ("tracing the alleged overcharges from manufacturers, to wholesalers,
 8 to retailers, to consumers presents individualized issues which would dominate this litigation
 9 and preclude certification under Rule 23(b)(3)"). Here, plaintiffs have not proposed a method
 10 that accounts for all of the complexities in the distribution channels for LCD panels and LCD
 11 Products.¹⁷

12 Complex chains of independent companies connect LCD panel manufacturers and
 13 indirect plaintiffs. [REDACTED] LCD panel manufacturers sell panels to many
 14 different OEMs, ODMs, contract manufacturers, and electronic parts distributors. *Id.* LCD Product
 15 manufacturers may purchase panels directly from panel manufacturers, indirectly through
 16 distributors, or indirectly through the components manufactured by ODMs and contract
 17 manufacturers. *Id.* Once an LCD Product manufacturer (e.g., an ODM, OEM, or vertically
 18

19¹⁷ This is not a theoretical problem. For example, the testimony of indirect purchaser
 20 plaintiff Shawn Stern, who owns a small computer services company that sells LCD
 monitors, underscores the individual nature of such pass-on decisions:

21 If the price [to my company] goes down I may lower my price. If the
 22 price goes up I may raise the price and in both circumstances, depending
 on what it is and who it is, I may maintain the price that I have.

23 Lazerwitz Decl. ¶ 24, Ex. 22 (Deposition of Shawn Stern, 134:4-22 (Feb. 12, 2009)); *see also* Lazerwitz Decl. ¶ 6, Ex. 4 (Deposition of David Allen (Rule 30(b)(6) Deposition of
 24 Crago, Inc.), 107:11-17 (Apr. 6, 2009)) ("Crago Dep.") ("Q. Did your cost ever go up but
 25 related to monitors but with other products as well. With competitors, sometimes we
 shaved the prices down and just absorbed the loss, you know, swallow hard and grin and
 bear it.").

1 integrated panel manufacturer) has assembled a finished product incorporating a panel, it may then
 2 sell that product directly to end-users through the Internet, to electronic products distributors that
 3 provide wholesaling services to retailers, to companies that alter the product to add value before
 4 reselling it, or to retailers such as Best Buy. *Id.* In addition, any intermediary may bundle the panel
 5 or LCD Product with other goods and services – for example by adding extra memory or software
 6 to a notebook computer – before it reaches the end-use consumer. *Id.*

7 Many LCD Product manufacturers purchase LCD panels from a variety of
 8 sources and regularly change their suppliers.
 9 [REDACTED]

10 Many of those suppliers are not alleged to have participated in any conspiracy.¹⁸
 11 [REDACTED]
 12 [REDACTED]

13 The use of different suppliers means that any given LCD Product model – even if sold by the
 14 same OEM – could contain both defendants' and non-parties' panels.

15 Furthermore, many – but not all – intermediaries have significant bargaining
 16 power and can obtain considerable discounts from different LCD panel manufacturers.
 17 [REDACTED]

18 In addition, intermediaries' bargaining power
 19 fluctuates over time because of the Crystal Cycle, the alternating periods of oversupply and
 20 shortage in the LCD panel industry. *See generally id.* ¶ 91. But plaintiffs' proposed method of
 21

22 Plaintiffs neither name either of
 23 these entities as defendants nor allege their involvement in antitrust violations. Quanta
 24 was an independent company until AU Optronics acquired it in late 2006. Lazerwitz Decl.
 25 ¶ 33, Ex. 31 (Dan Nystedt, *Taiwanese LCD Makers Merge to Take On Koreans*,
 26 Infoworld, April 7, 2006). While plaintiffs include a single conclusory allegation that
 Quanta participated in "working-level meetings," plaintiffs do not allege that Quanta
 entered into any pricing or production agreements or that Quanta was a coconspirator.
 Compl. ¶¶ 98, 144 (alleging agreements only at "CEO and Commercial Meetings").
 27
 28

1 measuring overcharge does not consider the bargaining power of intermediaries, either
 2 statically or over time.¹⁹

3 At each level of the distribution channel, independent intermediaries operate in
 4 different product markets and accordingly make pricing decisions in light of economic
 5 conditions particular to those markets. For example, LCD monitor manufacturers originally
 6 had to overcome competition from CRT technology, while LCD television manufacturers
 7 additionally must compete with plasma and rear projection technology. [REDACTED]

8 [REDACTED] Differing competing technologies create pricing pressures that vary based on which
 9 consumer electronics products are being sold. *E.g., In re Methionine Antitrust Litig.*, No. 00-
 10 1311, 2003 WL 22048232, at *5 (N.D. Cal. Aug. 26, 2003) ("*Methionine II*") (denying
 11 certification on predominance grounds where the market involved "a myriad of distribution
 12 channels, and hundreds of different products").²⁰

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Lazewitz Decl. ¶ 8, Ex. 6 (Deposition of Jeanne Flanagan,

20
 19 As previously presented to the Court, it is tremendously difficult to demonstrate a
 21 consistent overcharge even to direct purchasers, let alone to indirect purchasers. *See*
 22 *Defs.' Direct Purchaser Class Opp.* at 55-57.

23
 20 A related problem is that some class members, while they may not have purchased their
 24 LCD Products for resale, did in fact resell them. Named plaintiff Jai Paguirigan, who
 25 seeks to represent the Wisconsin class, is in this category. Lazerwitz Decl. ¶ 20, Ex. 18
 26 (Deposition of Jai Paguirigan, 65:18-67:15, 74:1-76:5, 116:6-118:25 (Feb. 9, 2009))
 27 ("Paguirigan Dep."). Such class members, proceeding under state antitrust laws that do
 28 not follow *Illinois Brick*, are subject to the unique defense that some or all of any
 overcharge to them was passed on to their buyer. *See Methionine I*, 204 F.R.D. at 164-65
 (declining to certify indirect purchaser class under Wisconsin antitrust law).

1 83:25-85:14 (Mar. 4, 2009)) (“Flanagan Dep.”) (testifying that she saved hundreds of dollars by
 2 purchasing an Apple computer bundle online from a competing website rather than from Apple
 3 directly). [REDACTED]

4 [REDACTED]
 5 [REDACTED]

6 The indirect purchaser classes proposed here are even more complex than the
 7 classes that Judge Alsup refused to certify in *GPU*. 253 F.R.D. at 506-07. In *GPU*, the named
 8 plaintiffs filed an antitrust suit claiming to represent final purchasers of computers that
 9 contained defendants’ graphics cards. *Id.* at 499. Like LCD panels and products, graphics
 10 cards pass through complex distribution channels and end-users purchase finished products
 11 (containing graphics cards) from “potentially thousands of different retailers and manufacturers,
 12 some of whom negotiated special prices.” *Id.* at 480. The necessary pass-through analysis
 13 would have required “a wholesaler-by-wholesaler and reseller-by-reseller” investigation, further
 14 complicated by the fact that some graphics cards were bundled with the finished products. *Id.*
 15 at 505-06. After evaluating Dr. Netz’s proposed method of proving classwide impact (which is
 16 nearly identical to one she offers here), Judge Alsup refused to certify the class because this
 17 method failed to account for the complex distribution network in the GPU industry. *Id.*
 18 Additionally, in a recent decision, Judge Ware followed Judge Alsup’s lead in refusing to
 19 certify an indirect purchaser class in a monopolization case, because “Plaintiff has failed to
 20 meet her burden of establishing a ‘reliable method for proving common impact’” when
 21 employing a method similar to plaintiffs’ method here. *Somers*, 2009 WL 2137148, at *8.

22 Plaintiffs’ attempts to distinguish *GPU* fall short. Plaintiffs first assert that *GPU*
 23 “is inconsistent with the binding Ninth Circuit authority in *Dukes* [v. Wal-Mart, 509 F.3d 1168
 24 (9th Cir. 2007)].” Pls.’ Mem. at 24 n. 33.²¹ But plaintiffs’ reliance on *Dukes* is improper,

25 21 While plaintiffs do not expressly state in the body of their brief upon which *Dukes* opinion
 26 they rely, Pls.’ Mem. at 24 n.33, this is the only *Dukes* case listed in their Table of
 Authorities. See *id.* at iv.

1 because the Ninth Circuit vacated the panel opinion and reheard the case en banc. *Dukes v.*
 2 *Walmart*, 556 F.3d 919 (9th Cir. Feb. 13, 2009). Regardless, plaintiffs misconstrue the panel
 3 opinion, which explicitly affirmed the district court's "rigorous analysis" of the conflicting
 4 evidence." *Dukes*, 509 F.3d at 1177 n.2 (explaining that it would have been error to reject
 5 defendant's arguments regarding commonality solely because they overlapped with merits
 6 issues).

7 Plaintiffs also contend that *GPU* is inconsistent with *Rubber Chemicals* and
 8 *DRAM I*. Pls.' Mem. at 24, n.33. But the markets for graphics processors in *GPU*, and the
 9 LCD panel markets here, are significantly more complicated than the product markets in either
 10 *Rubber Chemicals* or *DRAM I*. Moreover, both decisions dealt only with direct purchasers, not
 11 indirect purchasers, and therefore did not address the complexity introduced through multiple
 12 distribution levels. See *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 348 (N.D. Cal.
 13 2005); *In re Dynamic Random Access Memory Antitrust Litig.*, No. M 02-1486, 2006 WL
 14 1530166, at *2 (N.D. Cal. June 5, 2006) ("*DRAM I*"). Further, *Rubber Chemicals* involved
 15 commodity products sold at list prices, *In re Rubber Chems.*, 232 F.R.D. at 354, while in *DRAM*
 16 *I* "all pricing [was] dependent on the spot price." *DRAM I*, 2006 WL 1530166, at *9.

17 Finally, plaintiffs mistakenly contend that Judge Alsup relied on the fact that the
 18 government had dropped its investigation into the GPU industry. Pls.' Mem. at 24 n.33. While
 19 Judge Alsup's factual recitation mentioned that the government had dropped its investigation,
 20 he denied certification of the indirect purchaser class based exclusively on the plaintiffs' failure
 21 to offer a way to prove classwide impact. Compare *GPU*, 253 F.R.D. at 482, with *id.* at 501-07.
 22 As in *GPU*, plaintiffs here do not offer a classwide method of establishing pass-through that
 23 accounts for the realities of the complex distribution channels for LCD Products. As a result,
 24 plaintiffs' proposed classes would require countless mini-trials rendering this case
 25 unmanageable and unsuitable for class action treatment. *Methionine I*, 204 F.R.D. at 165.

1 2. Plaintiffs Have Not Proposed A Sufficient Method To Control For
 2 Wide Variations In Indirect Purchasers' Market Power And
 3 Negotiation Abilities

4 Aggregating indirect purchasers with varying degrees of market power in the
 5 same class precludes common proof of injury. *E.g., Burkhalter*, 141 F.R.D. at 154 (finding lack
 6 of common proof of injury where “purchasers have varying degrees of leverage” over
 7 defendants); *Infineon Techs. AG*, 2008 WL 4155665, at *11 (noting “the near impossibility of
 8 demonstrating, *with generalized proof*,” that large customers experienced impact just as small
 9 customers did) (emphasis in original). Large or sophisticated buyers are in a better position to
 10 bargain with suppliers. William H. Page, *The Limits of State Indirect Purchaser Suits: Class*
 11 *Certification in the Shadow of Illinois Brick*, 67 Antitr. L.J. 1, 33-34 (1999); *see also Wood v.*
 12 *Abbott Laboratories*, No. 96-512561, 1997 WL 824019, at *2 n.1 (Mich. Cir. Ct. 1997) (noting
 13 that differences in bargaining power can create differences in prices paid). Plaintiffs who
 14 negotiate individual prices may avoid paying any overcharge, thereby avoiding any antitrust
 15 injury. *Infineon Techs. AG*, 2008 WL 4155665, at *7 (requiring that plaintiffs show that class
 16 members paid artificially high prices). This is precisely the situation here. [REDACTED]

17
 18
 19 But while plaintiffs’ proposed classes include everyone from an individual
 20 purchasing an LCD television for home use to a sophisticated corporation purchasing LCD
 21 monitors in bulk for use in offices across the country, *see* Compl. ¶ 230, neither Dr. Netz nor
 22 plaintiffs do anything to account for dissimilarities among would-be class members. Thus, the
 23 proposed classes fail to account for variations in customer market power and negotiating ability.
 24

25 22 *See also* Crago Dep. 239:15-19 (“Q. So does that mean that on occasion you charge
 26 different prices to different customers for the same monitor or product that you’re selling?
 27 A. That’s possible, yes.”).

1 3. Plaintiffs Have Not Proposed A Sufficient Method That Accounts
 2 For Changes In The LCD Markets Over Time

3 Where pricing practices vary over time, determining whether even similarly
 4 situated indirect purchasers paid an overcharge is challenging. *McCarter v. Abbott Labs., Inc.*,
 5 No. Civ. A. 91-050, 1993 WL 13011463, at *2 (Ala. Cir. Ct. April 9, 1993) (rejecting class
 6 certification where retail prices varied “even with respect to the same brand, form and size of
 7 product depending on when, where, from whom, and in what quantity the product is
 8 purchased”). Determining whether a purchaser has paid an overcharge requires “an estimation
 9 of the relationship between wholesale price changes and retail price changes across time and
 10 location.” *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 1:04-md-1628, 2008 WL
 11 5661873, at *5 (S.D.N.Y. Feb. 20, 2008) (citation omitted).

12 Plaintiffs fail to account for tremendous changes in the LCD industry and
 13 distribution channels over the asserted class period. [REDACTED]

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 20 These and other factors affected the pricing decisions of panel manufacturers and
 21 any pass-on decisions of the intermediaries that comprise the distribution channels. But
 22 plaintiffs’ proposed method of measuring classwide impact does not account for these changing
 23 competitive constraints. [REDACTED] As a result, the Court would have to
 24 conduct an individualized inquiry to determine impact that would “necessarily vary from
 25 purchaser to purchaser, from product to product, from time to time, from place to place and
 26

1 from store to store," defeating the purpose of the class action vehicle. *McCarter*, 1993 WL
 2 13011463, at *3; *see also GPU*, 253 F.R.D. at 505.

3 4. Plaintiffs Have Not Proposed A Sufficient Method That Accounts
 For The Significant Variation In Panel Specifications

5 Where products are customized to particular purchasers' specifications, courts
 6 must scrutinize individual transactions to determine whether the purchase price is attributable to
 7 the customized features or to any alleged overcharge. *E.g., In re Industrial Diamonds Antitrust*
 8 *Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y. 1996) (determining impact in case with distinct products
 9 developed for particular customers would be an "enormous undertaking" not susceptible of
 10 common proof); *GPU*, 253 F.R.D. at 480. Defendants manufacture many non-interchangeable
 11 panels that are designed according to particular customers' specifications, depending on each
 12 customer's intended use of the panel. [REDACTED] Pan Decl. ¶

13 5; Pinder Decl. ¶¶ 4-7; [REDACTED] Customized panel features
 14 include size, thinness, weight, resolution, brightness, color quality, power consumption,
 15 response time, viewing angles, operating temperature range, product lifetime, and others. Decl.
 16 of Janet S. Netz in Supp. of Defs.' Joint Opp. to Direct Purchaser Pls.' Mot. for Class

17 Certification, Dkt. No. 1035, at 10 ("Netz Decl."); [REDACTED]

18 Pinder Decl. ¶ 7;

Yang Decl. ¶ 7.

21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 As a result, the prices they pay may reflect the
 costs associated with incorporating these performance characteristics, rather than an alleged
 anticompetitive surcharge. *Blades*, 400 F.3d at 570 (plaintiffs failed to adequately account for

¹ the fact that underlying products were not homogenous).

Determining whether an alleged overcharge affected all putative class members would require an analysis of how individual product characteristics affect each price paid down each specific distribution chain. Yet neither plaintiffs nor Dr. Netz propose any method of establishing common pass-through in light of panel variations or the resulting individualized product negotiations.

5. Plaintiffs Have Failed To Account For The Value Added To LCD Products As They Move Through The Supply Chain

11 As intermediaries add value to a product, it becomes increasingly difficult to
12 determine whether a price change is attributable to an alleged overcharge for the original
13 product or to differences in value intermediaries add later. *City of St. Paul v. FMC Corp.*, No.
14 3-89-0466, 1990 U.S. WL 259683, at *2 (D. Minn. Nov. 14, 1990) (“Because substantial value
15 is added to the chlorine at various points in the chain of distribution, the court would have to
16 examine the circumstances of each class member individually to determine whether that
17 member has suffered an overcharge.”); *Methionine II*, 2003 WL 22048232, at *4 (decertifying
18 indirect class where “the relationship between the price of methionine to direct purchasers and
19 the price of FM Poultry Mix to the end user will depend on many variables”);

21 By the time LCD Products reach end-use customers, they are highly
22 differentiated and are sold at different prices due to a variety of factors, including performance
23 characteristics and brand values.

In

addition, LCD panels represent significantly different proportions of the costs of different LCD Products.

To analyze properly whether any alleged overcharges were passed on through all stages of all relevant manufacturing and distribution channels and ultimately reached all indirect purchasers, the Court would have to analyze data on thousands of unique LCD panels incorporated into countless unique LCD Products. No method can account for all of these factors, and Dr. Netz does not offer one. *Id.* ¶ 217.

6. No Inference Of Impact Is Appropriate In This Case

Plaintiffs incorrectly assert for three state classes (California, Minnesota, and Florida) that “California and other repealer states’ laws permit an inference of classwide injury.” Pls.’ Mem. at 25, 27-28.²³ Rule 23, however, does not allow plaintiffs to presume antitrust impact, and, as discussed below, even assuming state law did apply, California, Minnesota, and Florida do not in fact permit an inference of impact.

Rule 23 governs the predominance issue here. “It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.” *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996); *see also Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965). “If the federal rule in question is clearly applicable, . . . the court need not consider whether *Erie*

²³ Plaintiffs do not argue that an inference of impact arises under the law of any other state. In fact, many state courts have explicitly rejected such an inference. *See, e.g., Melnick v. Microsoft Corp.*, Nos. CV-99-709, CV-99-752, 2001 WL 1012261, at *6 (Me. Super. Ct. Aug. 24, 2001) (denying certification under Maine antitrust statute and holding that each plaintiff must prove that the antitrust violation “did in fact cause him injury”); *Ren v. Philip Morris Inc.*, No. 00-004035-CZ, 2002 WL 1839983, at *6 (Mich. Cir. Ct. June 11, 2002) (in an indirect purchaser action under the Michigan Antitrust Reform Act, injury in fact cannot be established through the use of presumptions or inferences); *Sherwood v. Microsoft Corp.*, No. M2000-0185-COA-R9-CV, 2003 WL 21780975, at *30 (Tenn. Ct. App. July 31, 2003) (under the Tennessee Trade Practices Act, “plaintiffs will be required to prove they were actually damaged by the alleged monopolistic conduct”).

1 commands the enforcement of an allegedly substantive state rule seemingly in conflict.”
 2 *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 308 (5th Cir. 1984). As Rule 23(b)(3)
 3 applies to determining class action predominance in federal court, any supposedly contrary state
 4 rules are beside the point.²⁴

5 Accordingly, federal courts routinely deny or limit indirect purchaser class
 6 certification in cases brought under state antitrust laws without applying any inference of
 7 classwide injury that might be derived from state law. *E.g., GPU*, 253 F.R.D. at 482, 503-07
 8 (rejecting certification of indirect purchaser classes under California and other state laws due to
 9 lack of impact through common evidence without applying inference favoring certification);
 10 *Infineon Techs.*, 2008 WL 4155665, at *3, 5-12 (same); *In re OSB Antitrust Litig.*, No. 06-826,
 11 2007 WL 2253425, at *1, 8-9 (E.D. Pa. Aug. 3, 2007) (rejecting inference of impact and
 12 limiting indirect class involving state antitrust provisions). Rather, such cases reflect a court’s
 13 duty to conduct a “rigorous analysis” to ensure that class certification is warranted under Rule
 14 23, requiring the plaintiffs to offer not just inferences but “specific methodologies that purport
 15 to adequately demonstrate impact for all class members across customer, product, and
 16 procurement type.” *Infineon Techs.*, 2008 WL 4155665, at *5-10.

17 Even if state law and not Rule 23 governed the class certification analysis here,
 18 plaintiffs’ interpretation of state law is incorrect. Under California law, the California Supreme
 19 Court has never endorsed this inference. While California Courts of Appeal have referred to
 20 such a presumption in dicta, no California appellate court has relied on it to establish pass-on to
 21 indirect purchasers.²⁵ Additionally, any inference of injury applies only when “the effects of

22 24 For example, plaintiffs rely on *Comes v. Microsoft*, 696 N.W.2d 318, 323 (Iowa 2005), for
 23 the proposition that under Iowa procedural law, “common issues of liability would
 24 predominate even without a finding of commonality as to impact and damages.” Pls.’
 25 Mem. at 34. But Iowa procedural law does not apply here; federal law interpreting Rule
 23(b)(3) requires that plaintiffs show impact as to all class members on a classwide basis.

26 25 The cases plaintiffs cite are not to the contrary. See *In re Cipro Cases I & II*, 121 Cal.
 27 App. 4th 402, 411 (2004) (finding substantial evidence of common proof of classwide
 impact from brand name drug monopoly keeping generic drugs off the market); *BWI*

1 the price-fixing were not obscured by substantially altering or adding to the item received from
 2 the manufacturer.” *BWI Custom Kitchen v. Owens-Illinois*, 191 Cal. App. 3d 1341, 1352
 3 (1987). In other words, the inference applies only if the product reaches end-users unchanged
 4 from its original sale. *In re Cipro Cases I & II*, 121 Cal. App. 4th 402, 415-16 (2004). But
 5 here LCD panels are incorporated into a wide variety of different end-use products and are
 6 substantially changed as they move through the supply chain, rendering any inference of impact
 7 inapplicable. *Supra* § Argument II.B.4 – II.B.5. There is thus no basis, under either federal or
 8 California law, for this Court to dispense with the rigorous analysis required by Rule 23(b)(3)
 9 and simply assume that plaintiffs can meet their burden on impact.

10 Regarding Minnesota law, while plaintiffs characterize *Gordon v. Microsoft*
 11 *Corp.* as “permitting an inference of impact,” *see* Pls.’ Mem. at 38, *Gordon* only discusses
 12 inferring the particular amount of individual damage. *Gordon v. Microsoft Corp.*, No. 00-5994,
 13 2001 WL 366432, at *11 (Minn. Dist. Ct. Mar. 30, 2001). Whether each class member was
 14 injured to begin with, however, “is an element of liability and must be shown with some
 15 certainty.” *Id.* Therefore, under Minnesota law a court cannot rely solely on an inference of
 16 impact, but instead “must determine whether plaintiffs offer a viable method for determining
 17 classwide impact and whether ‘a mechanical calculation is available’ for determining individual
 18 damage amounts.” *Id.* (citing *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281
 19 (S.D.N.Y 1971)); *see also City of St. Paul*, 1990 WL 259683, at *2; *Keating v. Phillip Morris,*
 20 *Inc.*, 417 N.W.2d 132, 137 (Minn. Ct. App. 1987).

21 Plaintiffs’ assertion that in *In re Florida Microsoft Antitrust Litigation* a Florida
 22 trial court applied an inference of antitrust impact despite pricing diversity is wrong – that court
 23

24 *Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1352 n.8 (1987)
 25 (depositions of middlemen established that they pass on overcharges); *Rosack v. Volvo of*
 26 *Am. Corp.*, 131 Cal. App. 3d 741, 745-46 (1982) (involved no pass-on; vertical price-
 fixing cases where the class bought directly from coconspirators); *accord In re OSB*, 2007
 27 WL 2253425, at *6 (refusing to apply inference of classwide impact to a California state
 antitrust law class).

1 actually certified the class based on its finding that plaintiffs had proposed a reasonable method
 2 of proving impact and damages through common proof. *Compare* Pls.' Mem. at 32, *with In re*
 3 *Florida Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at *14-*15 (Fla. Cir. Ct.
 4 Aug. 26, 2002). More to the point, a Florida appellate court has held that "such presumption
 5 should not arise in indirect purchaser cases." *Execu-Tech Business Sys., Inc. v. Appleton*
 6 *Papers, Inc.*, 743 So. 2d 19, 22 (Fla. 4th Dist. Ct. App. 1999); *see also In re Relafen*, 221
 7 F.R.D. at 280-82 (relying on *Execu-Tech* to deny a Florida state class due to lack of a "precise
 8 showing of individual impact").

9 7. Dr. Netz's Analyses Are Deficient

10 a. Dr. Netz's Regression Analyses, Which Use Average Prices
 Rather Than Disaggregated Prices, Are Empirically Unsound

12 Dr. Netz relies on regression analyses to conclude that there was a 100% pass-on
 13 through each level of the distribution chain of every alleged overcharge on every panel
 14 incorporated into every LCD Product purchased by every putative class member over the entire
 15 class period, thus supposedly providing a common method for showing impact on all class
 16 members. Netz Decl. at 102-14. But Dr. Netz's use of regression analyses here does not
 17 demonstrate impact for all putative class members through common evidence. On the
 18 contrary, the regression analyses assume that all class members are affected – they are not a tool
 19 for testing that assumption. *See* Snyder Decl. ¶¶ 192-93.²⁶

21 26 Lazerwitz Decl. ¶ 39, Ex. 37 (ABA Section of Antitrust Law, *Econometrics: Legal,*
 22 *Practical, and Technical Issues* 202, 221 (ABA Publishing 2005)) ("ABA *Econometrics*")
 23 ("By their very nature, regressions summarize data. In the process of summarizing, they
 24 can overlook crucial detail. For example, it is always possible to perform a regression
 25 with the price as a dependent variable and with a variety of independent variables. The
 26 regression can be estimated, and a line can be fitted to the data. This does not mean,
 however, that impact can be shown with common proof, or that damages can be calculated
 in a formulaic manner. More careful analysis of the data is necessary to make sure that
 when the regression captures trends, it is not missing important information specific to
 individual customers that runs counter to those trends.")

1 Dr. Netz's regressions further mask relevant differences in the individual
 2 transaction data because she uses averages rather than disaggregated transaction data. *GPU*,
 3 253 F.R.D. at 494. As the American Bar Association has explained:

4 Sometimes the prices used by economists are averages of a number of
 5 different prices charged to different customers or for somewhat different
 6 products. Using such averages can lead to serious analytical problems.
 7 For example, averages can hide substantial variation across individual
 8 cases, which may be key to determining if there is common impact. In
 9 addition, average prices may combine the prices of different package
 10 prices of the same product or of somewhat different products. When this
 11 happens, the average price paid by a customer can change when the mix of
 12 the products that the customer buys changes – even if the price of no
 13 single product changed.

14 ABA *Econometrics* at 220 (quoted in *GPU*, 253 F.R.D. at 494).

15 As a result of her involvement in *GPU*, Dr. Netz was well aware of the analytical
 16 perils of data aggregation and the related risk that averaging data could skew her empirical
 17 findings. Yet Dr. Netz glosses over this shortcoming by not disclosing or evaluating its
 18 dangers. *See* Netz Decl. at 109-10 (relying on averages rather than on disaggregated cases).
 19 Dr. Snyder explains that Dr. Netz's average-price regressions yield little insight into the likely
 20 increase in the prices of widely different LCD Products for different customers at different
 21 times:

22 .
 23 For example, if one were to apply regression analysis to data on all
 24 homes in the country between 1999 and 2006 and find that, on
 25 average, housing prices went up by 5%, it would say nothing about
 26 the increase (or decrease) in the price of any given house in the
 27 country. This issue of averaging is compounded in this matter
 28 because the percentage of the cost represented by LCD panels in
 the finished products at issue varies so much. Suppose that, on
 average, a \$100 increase in the cost of lumber required to build an
 average house increases the average price of a house by \$90, this
 would yield little insight about the likely increase in the price of a
 log cabin in Oregon versus a brick home with much less lumber
 input in San Francisco. Nevertheless, if one were to accept Dr.
 Netz's methodology for assessing pass on, one would conclude
 that each and every house would increase in price by \$90
 regardless of the nature of the house.

1 Snyder Decl. ¶ 194. In relying on averages, Dr. Netz's analysis inappropriately masks critical
 2 differences in prices across models, customers, and time within her aggregated categories. *Id.* ¶
 3 204 (“Dr. Netz imposes a common pass-on rate across products and time periods without first
 4 testing whether constraining the pass-on rate in such a way is appropriate If she had done
 5 so, Dr. Netz would have found that her pass-on analysis supports the predominance of
 6 individual factors over common factors in determining pass-on and, therefore, impact.”).

7 Using Dr. Netz's proposed method, Dr. Snyder has conducted disaggregated
 8 analyses of different subsets of the intermediary data sets. [REDACTED] These disaggregated
 9 analyses show that, even under Dr. Netz's method, pass-on rates vary based on characteristics
 10 of particular transactions, such as the product and time period involved, and that for some
 11 transactions there is no pass-on and therefore no impact on the ultimate purchaser.
 12 [REDACTED]

13 [REDACTED] Thus, Dr. Netz's proposed regression analyses actually show that “the
 14 impact of alleged overcharges at the manufacturer level, when they are alleged to exist, on end
 15 users would depend on factors such as the product purchased and the time of the purchase as
 16 well as the intermediaries through which the product was purchased by the end user.” *Id.* ¶ 206.
 17 Thus, Dr. Netz's conclusion that there was a 100% pass-on rate on all transactions flows from
 18 her assumption that all transactions are the same – she assumes the conclusion she is trying to
 19 prove. [REDACTED] This circular reasoning
 20 does not show classwide impact through a common method.

21 b. Dr. Netz's Regression Analyses Rely On Different Variables

22 The variables Dr. Netz applies in her various regression models frequently differ.
 23 For example, variables such as LCD panel size, resolution, and contrast ratio, or the brand of
 24 the finished product, are explanatory variables for some intermediaries but not for others.
 25 [REDACTED] Dr. Netz fails to provide any justification for selecting any one
 26 set of explanatory variables over another, “suggesting that the exclusion of relevant variables is
 27 likely to affect any and all of her analyses.” *Id.* ¶ 54. Thus, Dr. Netz uses a different method to
 28

1 show pass-on for each intermediary – necessarily resulting in thousands of individual formulas.
 2 Combined with her reliance on averages, Dr. Netz's use of different variables for different
 3 regressions leads to the same unacceptable result that justified the denial of class certification in
 4 *GPU*. 253 F.R.D. at 504 (“If this class were certified, Dr. Netz’s regressions would either be
 5 overly reliant on averages and would thus sweep in an unacceptable number of uninjured
 6 plaintiffs, or they would be unmanageably individualized.”).

7 c. Dr. Netz’s Estimate Of Impact On Direct Purchasers Is Flawed

8 Dr. Netz uses unreliable methods to reach her conclusion that the alleged
 9 conspiracies had an impact on all direct purchasers. *Compare* Netz Decl. at 66-71, with [REDACTED]
 10 [REDACTED]. First, Dr. Netz averages defendants’ prices for panels sold to direct purchasers
 11 without considering difference in prices “for panels of various sizes, resolutions, applications,
 12 models, and sold to various customers.” Snyder Decl. ¶ 181. This averaging masks variation in
 13 individual prices. *See* § Argument II.B.7.a; [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]

22 [REDACTED], are not as reliable as
 23 defendants’ “more precise” transactional data. Snyder Decl. ¶ 197. In fact, there is no way to
 24 know whether the prices companies reported to DisplaySearch even accurately reflect the
 25 average transactional price or simply a particular employee’s estimation of the average price;
 26 the defendants’ transactional data does not suffer from this uncertainty. Moreover, when
 27 reporting prices to independent publications or otherwise making them available to competitors,
 28

1 sellers would have various incentives to misreport.

2 [REDACTED] Given
3
4 these and other limitations, the publicly available DisplaySearch data would less likely reflect
5 actual prices.

6 [REDACTED]
7 [REDACTED] But
8

9 plaintiffs have taken 30(b)(6) depositions of all defendants on the topic of “[t]he nature of the
10 records of [their] sale of TFT-LCD Products,” e.g., Lazerwitz Decl. ¶ 30, Ex. 28 (Indirect-
11 Purchaser Pls.’ Cross-Notice of 30(b)(6) Dep. of Def. Chi Mei Corp., at 5 (Feb. 2, 2009)),
12 [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 d. Dr. Netz’s Regression Analyses Rely On Competitive Periods
Inconsistent With Plaintiffs’ Allegations

16 [REDACTED]
17 Plaintiffs assert that a price fixing conspiracy “extend[ed] from at least
18 January 1, 1996” and “continu[ed] through the filing of the Second Amended Complaint” in
19 December 2008. Compl. ¶¶ 1, 251.
20 [REDACTED]

1
2 [REDACTED]
3 Dr. Netz's reliance on the periods before 1999 and after 2006 as "competitive
4 period[s]" is therefore inconsistent with plaintiffs' allegations. Dr. Netz affirmatively relies on
5 the absence of a conspiracy during "the period before 1999 and the period after 2006" for the
6 purpose of her price regressions, which she could not do if there were anticompetitive activity
7 during these periods. Netz Decl. at 91-92;
8 [REDACTED]

9 [REDACTED] Plaintiffs cannot contend that Dr.
10 Netz's regression analyses are reliable and simultaneously allege that the "competitive
11 period[s]" on which she relies were not, in fact, competitive.²⁸

12 C. Plaintiffs Fail To Explain How Establishing Damages Will Be Manageable

13 Plaintiffs' method of proving damages, *see* Pls.' Mem. at 24-25; Netz Decl. at
14 115-16, does not satisfy Rule 23(b)(3)'s manageability requirement. Where the calculation of
15 damages "requires separate mini-trial(s) of an overwhelming large number of individual claims,
16 courts have found that the staggering problems of logistics thus created . . . render the case
17 unmanageable as a class action." *Windham v. American Brands, Inc.*, 565 F.2d 57, 68 (4th Cir.
18 1977) (internal quotation marks and citations omitted). For example, in *Piggly Wiggly*
19 *Clarksville, Inc. v. Interstate Brands Corp.*, the court affirmed the denial of class certification in
20 a price fixing case, stating:

21 plaintiffs and their expert did not persuade the district court, and do not
22 persuade us, that a reliable formula for damages can be devised which will
23 yield statistically significant results, that the data that would have to be
plugged into such a formula can be assembled, that the relevant variables
like negotiating skill can be quantified, and that all of this can be used to

24
25 ²⁸ If the Court were to deem reliable Dr. Netz's analyses based on data "for the period since
26 2006" as untainted by the alleged conspiracy, it should not certify plaintiffs' injunctive
27 class based on their assertion that the alleged conspiracy is "ongoing" today. Compare
Netz Decl. at 91-92, with Pls.' Mem. at 14 and Compl. ¶251. See *infra* § Argument IV.A.
28

1 reliably measure antitrust damages for each of the many thousands of
 2 members of the proposed class.

3 100 F. App'x 296, 300 (5th Cir. 2004). Similarly, in *Abrams v. Interco, Inc.*, 719 F.2d 23 (2d
 4 Cir. 1983), the court affirmed the denial of class certification in a price fixing action, noting the
 5 “serious problem of manageability relate[d] to damages . . . complicated by the scores of
 6 different products involved, varying local market conditions, fluctuations over time, and the
 7 difficulties of proving consumer purchasers [sic] after a lapse of five or ten years.” *Id.* at 31, 40
 8 (quoting a leading antitrust treatise instructing that “the courts will not permit class actions
 9 unless they can devise a practical means for their litigation”); *see also In re Hotel Telephone*
 10 *Charges*, 500 F.2d at 89-90 (reversing certification in price fixing action, because determining
 11 the “basis for computing damages” and then calculating damages “could require decades of
 12 litigation”); *Butt v. Allegheny Pepsi-Cola Bottling Co.*, 116 F.R.D. 486, 493 (E.D. Va. 1987)
 13 (denying certification in a price fixing case, where “it appear[ed] that a class-action suit could
 14 well require an overwhelming and unmanageable number of mini-trials, with juries, in order to
 15 resolve the issues of injury and damages”).

16 Plaintiffs argue that their “burden to qualify even the damages proof as yet
 17 another common question is a modest one.” Pls.’ Mem. at 24. But it is “not enough that
 18 Plaintiffs merely promise to develop in the future some unspecified workable damages formula.
 19 A concrete, *workable* formula must be described *before* certification is granted.” *Allied*
 20 *Orthopedic Appliances, Inc v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156, 176 (C.D. Cal.
 21 2007) (emphasis added); *see In re Hotel Telephone Charges*, 500 F.2d at 90 (district court erred
 22 in “rel[y]ing on the ‘imagination’ of [plaintiffs’] counsel to provide solutions that will, at some
 23 point in the future, prevent . . . individual issues [including those related to damages and
 24 damages calculation] from splintering the action into thousands of individual trials requiring
 25 years to litigate”).

26 Here, plaintiffs offer the following formula for calculating damages: “Damages
 27 to class members, for each product at issue [monitors, notebooks, or televisions] and for each

1 year, are then the product of revenues from class members for each product at issue and for
 2 each year, multiplied by the appropriate overcharge rate, and multiplied by the appropriate pass-
 3 through rate.” Netz Decl. at 116. But this simplistic formula is unworkable for several reasons.
 4 First, the Ninth Circuit does not “allow[] damages in the form of fluid recovery,”²⁹ because
 5 “allowing gross damages [due to the class as a whole] by treating unsubstantiated claims of
 6 class members collectively significantly alters substantive rights under the antitrust statutes.” *In*
 7 *re Hotel Telephone Charges*, 500 F.2d at 89-90; *accord McLaughlin*, 522 F. 3d at 231
 8 (“Roughly estimating the gross damages to the class as a whole and only subsequently allowing
 9 for the processing of individual claims would inevitably alter defendants’ substantive right to
 10 pay damages reflective of their actual liability.”). Plaintiffs’ damages formula is a fluid
 11 recovery model, because it purports to apportion gross damages due to each subgroup of class
 12 members as a whole, but does not give any way to calculate actual damages to each of the
 13 millions of members of each subgroup.³⁰

14 Second, plaintiffs’ damages formula does not account on a classwide basis for
 15 the many variables that influence the intermediaries’ pricing and discounting decisions
 16 (including rebates and bundling) with respect to the wide variety of differentiated LCD
 17 Products.

19 29 A fluid recovery method consists of three main steps. “First, defendant’s aggregate
 20 liability is determined in a single, classwide adjudication and paid into a class fund.
 21 Second, ‘individual class members are afforded the opportunity to collect their individual
 22 shares,’ usually through a simplified proof of claim procedure. Third, any residue
 23 remaining after individual claims have been paid is distributed to the class’[s] benefit
 24 under cy pres or other doctrines.” *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d
 25 Cir. 2008) (citation and footnote omitted).

26 30 Plaintiffs’ method addresses only the first step of the three-step fluid recovery method –
 27 the calculation of defendants’ aggregate liability. See *McLaughlin*, 522 F.3d at 215, 231.
 28 Based on plaintiffs’ method, the only way to distribute this aggregate sum of money would
 29 be to follow steps two and three of the fluid recovery method, i.e., by allowing individual
 30 class members to collect damages through a simplified claims procedure and distributing
 31 any remaining funds under cy pres or a similar doctrine.

1
2
3 Any of these factors may alter the damages, if any, an individual class member
4 incurred; determining those individual damages would require an individual trial by jury for
5 each class member.³²

6 Third, the evidence on which plaintiffs propose to rely to calculate their damages
7 is either demonstrably wrong or irrelevant. Plaintiffs' overcharge and pass-on calculations are
8 flawed in their damages formula for the same reasons they are flawed in their impact formula.
9 Plaintiffs' method for excluding purchases made by governmental entities (as they must do
10 under the class definition), Netz Decl. at 116, is also deficient. Instead of using data on
11 governmental purchases of LCD Products, plaintiffs rely as a "proxy" on the share of computers
12 sold to governmental entities, which Dr. Netz assumes without explaining is comparable to the
13 share of LCD televisions, monitors, and notebooks sold to governmental entities. *Id.* Plaintiffs'
14 "yardstick" method fails because they provide no evidence that the governmental buying
15 patterns for computer systems are substantially similar to those for LCD televisions, monitors,

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22³² In addition, plaintiffs' formula does not address the changes in the intermediaries'
23 bargaining power over time. Each intermediary's bargaining power is not constant, but
24 fluctuates with the Crystal Cycle: intermediaries have more negotiating leverage in times
25 of oversupply and less in times of shortage. *See generally* Snyder Decl. ¶ 91. Even if
26 plaintiffs were able to devise a common damages formula that takes account of the many
variables and factors involved, it is unlikely that they could ever obtain all the data that
reflects those variables to calculate damages to each class member, as in many
circumstances such data would be nonexistent or inaccessible. *See id.* ¶¶ 35-40, 221.
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1 or notebooks. *See Weisfeld*, 84 F. App'x at 261 n.3 ("Selection of the yardstick industry is
 2 based on its similarity – for example, in terms of structure, product demand, capital, labor and
 3 materials input trends and product technology – to the industry being investigated."). Nor do
 4 plaintiffs otherwise explain why it is permissible to use anything other than data relating to
 5 LCD Products to determine damages.

6 Plaintiffs' formula also purports to eliminate purchases made in states other than
 7 the 23 proposed class states by comparing the states' populations. Netz Decl. at 116. But
 8 because household income varies by state, the raw relative populations of the states do not
 9 indicate the buying pattern of the individual class members. For example, consumers in
 10 wealthier but less populous states may buy more LCD Products than consumers in poorer but
 11 more populous states. *See Lazerwitz Decl. ¶ 34, Ex. 32* (U.S. Census Bureau, Income 2005,
 12 Two-Year Average Median Household Income By State: 2003-2005) (showing variations in
 13 household income by state).³³ Moreover, plaintiffs' calculation does not account for
 14 individuals who purchased a product in one state but at the time of class certification live in
 15 another,³⁴ a group that must be excluded under the class definitions. *See Pls.' Mem. at 2-3.*

16 **D. Because Plaintiffs Present No Evidence That Shows The Existence Of A**
 17 **Single Conspiracy Involving All Defendants, Common Issues Of Fact Do**
 18 **Not Predominate As To All Class Members**

19 To certify a class against all defendants, plaintiffs must adduce evidence
 20 showing a common conspiracy. *See, e.g., Alabama v Blue Bird Body Co.*, 573 F.2d 309, 323

21 ³³ For example, median household income ranged from a low of \$34,396 in Mississippi to a
 22 high of \$58,854 in Hawaii in 2004-2005. *Id.*

23 ³⁴ *See Lazerwitz Decl. ¶ 35, Ex. 33* (Michael J. Walsh & Jonathan D. Jones, *More Evidence*
 24 *On The "Border Tax" Effect: The Case Of West Virginia, 1979-84*, 41(2) Nat'l Tax J. 261,
 25 264 (1988)) ("sales tax differentials are an effective incentive for consumers to cross state
 26 borders to take advantage of lower after-tax prices in low-tax regions if they are near the
 27 border"); *Lazerwitz Decl. ¶ 36, Ex. 34* (William F. Fox, *Tax Structure And The Location*
 28 *of Economic Activity Along State Borders*, 39(4) Nat'l Tax J. Vol. 387, 387 (1986))
 ("consumers are more likely to change their consumption behavior in response to
 increases in the easily observable general sales tax than in other taxes that may indirectly
 raise business costs").

1 (5th Cir. 1978) (“[T]he national class should not have been certified since there would be no
 2 evidence linking the different conspiracies to each other in order to establish the one ‘common’
 3 conspiracy. Common issues of fact do not predominate in such a situation even though all the
 4 plaintiffs might have separate causes of actions against the same defendants based upon similar
 5 theories of recovery.”); *Panache Broad. of Pa. v. Richardson Elecs.*, No. 90-C-6400, 1995 U.S.
 6 Dist. LEXIS 14462, at *41-48 (N.D. Ill. Sept. 27, 1995) (declining to certify a class that
 7 included individuals who purchased products not subject to an agreement which gave rise to
 8 plaintiffs’ antitrust claims). Federal courts continue to follow *Blue Bird*, holding that “multiple
 9 conspiracies” affect different class members differently, thereby undermining any presumption
 10 that proof of an unlawful agreement is a common issue. *See, e.g., In re Polypropylene Carpet*
 11 *Antitrust Litig.*, 178 F.R.D. 603, 615-19 (N.D. Ga. 1997); *GPU*, 253 F.R.D. at 484.³⁵
 12 Accordingly, on a motion for class certification, “[p]laintiffs must show they will prove one
 13 common conspiracy to fix prices in all relevant markets,” using “common evidence that reveals
 14 a common nucleus of operative facts.” *In re Polypropylene Carpet*, 178 F.R.D. at 618 (citation
 15 omitted).

16 While plaintiffs’ complaint contains conclusory allegations of a single
 17 overarching conspiracy, Compl. ¶¶ 130, 146, plaintiffs’ own more specific allegations, certain
 18 defendants’ guilty pleas, statements by the government, and the very nature and history of the
 19 LCD panel industry all contradict the notion of a single overarching conspiracy. To the extent
 20 that plaintiffs may have been harmed by different, unconnected alleged agreements, common
 21 issues of fact regarding liability do not predominate.

22 First, plaintiffs allege that defendants committed the following distinct overt acts
 23 in furtherance of a common conspiracy:

24
 25 35 These issues were not addressed in the cases plaintiffs cite, because the defendants in
 those cases did not dispute that the existence of a price-fixing agreement as alleged was a
 common issue. *See DRAM I*, 2006 WL 1530166, at *4; *In re Rubber Chems.*, 232 F.R.D.
 at 352; *In re Citric Acid*, 1996 WL 655791, at *3.
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- 1 • The “Crystal Meetings,” taking place “from early 2001 through at least
2 2006.” *Id.* ¶¶ 133, 142, 144-48;
- 3 • A conspiracy between Japanese manufacturers only in “the early years.”
4 *Id.* ¶ 131;
- 5 • Bilateral discussions between Sharp and other unnamed coconspirators
6 (including a wholly speculative and conclusory allegation that Sharp must
7 have conspired with Toshiba) regarding panels sold to Apple, Dell, and
8 Motorola. *Id.* ¶ 147;³⁶ and
- 9 • A conspiracy by which certain executives’ “public statements . . . resulted
10 in, among other things, a temporary halt in the expansion of production
11 capacity among defendants.” *Id.* ¶¶ 173, 175, 176, 178.

12 Plaintiffs do not show that these alleged overt acts relate to one another in any way. Taking
13 plaintiffs’ nonconclusory allegations as true, there were at least four separate alleged
14 conspiracies.

15 Plaintiffs’ allegations of a number of separate conspiracies are consistent with the
16 guilty pleas on which plaintiffs rely. *See* Pls.’ Mem. at 3 n.10; Compl. ¶¶ 189-91. The pleas
17 describe different conspiracies involving different scopes, time periods, and markets. Chunghwa’s
18 and LG Display’s plea agreements cover panels sold in the United States and elsewhere from
19 September 2001 to June 2006 and December 2006, respectively, while Sharp’s plea agreement
20 covers its specific products sold only to Dell, Motorola, and Apple during segmented periods.

21 *Compare* LG Display Plea Agreement, Dkt. No. 749-2, at 4, *and* Chunghwa Plea Agreement, Dkt.

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24 36 Plaintiffs allege that Toshiba must have participated in a conspiracy because (i) Sharp
25 pleaded guilty; (ii) Toshiba sold LCD panels to Dell and Apple; and (iii) Toshiba had a
26 non-dominant market share of between 14.1% and 14.5% of the market for small and
 medium sized LCD panels. *Id.* ¶ 147. This sort of speculation by inference lacks any
 specific factual allegations.
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1 No. 767-2, at 3, and Compl. ¶¶ 189-90; with Sharp Corp. Plea Agreement, Dkt. No. 750-2, at 2-4,³⁷
 2 and Compl. ¶ 191.

3 Indeed, the government has acknowledged that its investigation has not revealed
 4 the existence of a single conspiracy involving all defendants. During a November 12, 2008,
 5 public announcement of the guilty pleas, Assistant Attorney General Thomas O. Barnett
 6 described the alleged Chunghwa and LG Display conspiracy, but then noted that Sharp “has
 7 agreed to plead guilty for participating in *other conspiracies* to fix the price of LCD panels to
 8 three specific customers – Apple, Dell and Motorola.” Lazerwitz Decl. ¶ 32, Ex. 30 (Thomas
 9 O. Barnett, Ass’t Attorney Gen., Remarks at a Press Conference Regarding LG, Sharp and
 10 Chunghwa’s Agreements to Plead Guilty in LCD Price-Fixing Conspiracies, at 1 (Nov. 12,
 11 2008)) (emphasis added). Mr. Barnett added that Sharp’s plea involved “*three separate* price-
 12 fixing agreements for sales of LCDs to three major purchasers.” *Id.* at 2 (emphasis added).

13 Hitachi Displays’ plea agreement is limited in scope as well, as it pertains only
 14 to its sales of panels for notebook computers to Dell from April 1, 2001, to March 31, 2004.
 15 Hitachi Displays Plea Agreement, Dkt. No. 1000-2. During Hitachi Displays’ plea hearing, the
 16 government’s attorney, David Ward, emphasized that Hitachi Displays’ plea addressed a
 17 separate conspiracy unconnected to the “Crystal conspiracy” and stated that “[t]he conspiracy to
 18 which LG [Display] pled to and CPT pled to was a related, but *separate*, conspiracy that did not
 19 involve this defendant.” Lazerwitz Decl. ¶ 29, Ex. 27 (Tr. of Proceedings, *United States v*
 20 *Hitachi Displays Ltd.*, No. CR-09-0247 (N.D. Cal. May 22, 2009)) at 16:22-24 (emphasis
 21 added). When the Court asked whether the government developed proof of “many separate
 22 little conspiracies,” Mr. Ward replied:

23
 24 37 Specifically, Sharp pleaded to fixing prices, through “bilateral telephone discussions” and
 “bilateral meetings,” of panels sold to: (1) Dell, from April 1, 2001, to December 1, 2006,
 for use in computer monitors and notebooks; (2) Motorola, from the fall of 2005 to the
 middle of 2006, for use in Razr mobile phones; and (3) Apple, from September 1, 2005, to
 December 1, 2006, for use in iPod portable music players. *Id.*
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1 Yes, Your Honor. We believe there was a larger conspiracy involving LG
 2 [Display] and CPT and others to fix the price of TFT-LCD sold to many
 3 manufacturers. The Government does not believe that either Hitachi
 4 [Displays] or Sharp were involved in that conspiracy. We believe that
 5 Hitachi [Displays], Sharp, and other unnamed coconspirators were
 involved in a separate conspiracy amongst themselves to fix the price of
 TFT-LCD sold only to Dell. So they're related conspiracies, but they're
 not the same conspiracies.

6 *Id.* at 17:18-18:1. The guilty pleas do not evidence a single conspiracy to fix the prices paid by
 7 any class member. As the government told the Court with respect to Hitachi Displays, for
 8 example, "the Government does not have evidence to prove a conspiracy to fix prices of TFT[-
 9 LCD panels] sold to any other customers other than Dell." *Id.* at 16:3-5. These guilty pleas
 10 underscore the absence in the complaint of any allegation that the Japanese defendants (Sharp,
 11 Hitachi Displays, and Toshiba) participated in a single overarching conspiracy with other
 12 defendants.

13 Plaintiffs' and the government's allegations of different conspiracies are more
 14 consistent with economic conditions in the LCD panel industry than the single conspiracy on
 15 which the proposed class definitions are premised.

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Plaintiffs' expert, Dr. Netz, also
 22 acknowledges that "the TFT-LCD industry has been characterized by rapid technological
 23 advances and frequent changes in panel generations." Netz Decl. at 48. These rapid changes
 24 "constrain the ability of the alleged cartel to raise prices across all products, customers and time
 25 periods thereby challenging . . . the notion of a uniformly effective conspiracy." Snyder Decl. ¶
 26 92.

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1 Finally, to the extent there were separate conspiracies, Dr. Netz's assumption of
 2 a single conspiracy undermines, from the outset, her attempt to show impact across the class.

3 *Id.* ¶ 182. [REDACTED]

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11 **III. THE PROPOSED CLASSES ARE NOT ASCERTAINABLE UNDER**
RULE 23(A)

12

13 Class certification should also be denied under Rule 23(a) because plaintiffs
 14 failed to define an ascertainable class. "As a threshold matter, and apart from the explicit
 15 requirements of Rule 23(a), the party seeking class certification must demonstrate that an
 16 identifiable and ascertainable class exists." *Mazur v. eBay Inc.*, No. 07-03967, 2009 WL
 17 1203937, at *4 (N.D. Cal. May 5, 2009); *see also In re Tableware Antitrust Litig.*, 241 F.R.D.
 18 644, 650 (N.D. Cal. 2007) (stating that, under Rule 23(a), "there must be some evidence that a
 19 class . . . may be defined with reasonable specificity"); *Whiteway v. FedEx Kinko's Office &*
 20 *Print Servs., Inc.*, No. 05-2320, 2006 WL 2642528, at *3 (N.D. Cal. Sept. 14, 2006) ("An
 21 implied prerequisite to certification is that the class must be sufficiently definite.").³⁸ Plaintiffs
 22 bear the burden "to demonstrate that the proposed class definition is 'precise, objective, and

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26 ³⁸ Although ascertainability is a well-established requirement under Rule 23(a), plaintiffs do
 27 not address it in their motion.

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1 presently ascertainable.”” *Mad Rhino, Inc. v. Best Buy Co.*, No. 03-5604, 2008 U.S. Dist.
 2 LEXIS 8619, at *9 (C.D. Cal. Jan. 14, 2008)).³⁹

3 The Court’s recent decision in *eBay* is instructive. Plaintiffs in *eBay* sought to
 4 certify a class, in part, of “all persons who would have won auctions but for a shill bidder
 5 entering the highest bid.” *eBay*, 2009 WL 1203937, at *4. The Court found this class “wholly
 6 unascertainable,” because plaintiffs “neither presented evidence identifying auctions in which a
 7 shill bid was the highest bid and the putative ‘would-be winner,’ nor have plaintiffs suggested a
 8 method by which to determine how to identify such persons or such auctions.” *Id.* The Court
 9 further emphasized that “the class members themselves might not know if they were members
 10 of the class.” *Id.* The Court rejected this class definition “because it fail[ed] to set forth a class
 11 which [was] ascertainable and clearly identifiable.” *Id.*

12 Like the proposed class in *eBay*, plaintiffs’ proposed classes here are
 13 unascertainable. Plaintiffs’ proffered class definitions encompass indirect purchasers who
 14 bought LCD Products incorporating panels manufactured by “one or more of the named
 15 Defendants.” Pls.’ Mem. at 2-3. In most instances, neither plaintiffs nor defendants will be
 16 able to determine whether a particular LCD Product contains a panel manufactured by a
 17 defendant, as opposed to a third-party manufacturer. There is no way to determine who
 18 manufactured the panel contained in a finished product by looking at the product, and
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20 39 Two reasons underlie this requirement. First, the judgment in any class action must
 21 “specify or describe . . . whom the court finds to be class members,” Rule 23(c)(3)(B), and
 22 therefore the class must be “definite enough so that it is administratively feasible for the
 23 court to ascertain whether an individual is a member.” *O’Connor v. Boeing N. Am., Inc.*,
 24 184 F.R.D. 311, 319 (C.D. Cal. 1998). Second, a consumer receiving notice under Rule
 25 23(c)(2)(B) must be able to determine whether he is a member of the class or not, so as to
 26 decide whether to opt-out (if he is in the class) or pursue an individual claim (if he is not
 27 in the class). *Cf. Jones v. Nat’l Sec. Fire & Cas. Co.*, No. 06-1407, 2006 WL 3228409, at
 28 *4 (W.D. La. Nov. 3, 2006) (unascertainable “‘definitions frustrate efforts to identify class
 29 members, contravene the policy against considering the merits of a claim in deciding
 whether to certify a class, and create potential problems of manageability.’”) (quoting
Manual for Complex Litigation (Third) § 30.14 (2003)).

1 defendants are not aware of any sources of information available to end-users that consistently
 2 identify the manufacturer of the LCD panel contained in a finished product. The ability to
 3 ascertain the identity of the manufacturer of an LCD panel appears to be more the exception
 4 than the rule. Snyder Decl. ¶ 35. With the exception of Gladys Baker, none of the 38 named
 5 plaintiffs could identify the manufacturer of the LCD panel contained in his LCD Product.⁴⁰

6 Like the plaintiffs in *eBay*, plaintiffs here have not “presented evidence
 7 identifying” which LCD Product purchasers are in the class and which are not. *eBay*, 2009 WL
 8 1203937, at *4. Nor is it likely that plaintiffs could obtain such evidence, as the distribution
 9 channels are so complex and have so many participants that plaintiffs would be required to
 10 gather massive amounts of data – much of which likely no longer exists due to the passage of
 11 time – from thousands of third parties. [REDACTED] In fact, over the past 20
 12 months of discovery on the issue, plaintiffs have served subpoenas on 61 third parties and
 13 received transactional data from all defendants. Yet, plaintiffs have not even shown that their
 14 proposed class representatives purchased products containing panels manufactured by
 15 defendants, let alone that other purported class members did so.

16 And like the plaintiffs in *eBay*, plaintiffs here have not “suggested a method by
 17 which to determine how to identify” such products. *eBay*, 2009 WL 1203937, at *4.⁴¹ Indeed,

18 40 Compare, e.g., Lazerwitz Decl. ¶ 12, Ex. 10 (Deposition of Byron Ho, 58:11-19, 59:23-
 19 60:11, 63:19-64:11 (Apr. 27, 2009)) (“I don’t think I’m qualified to figure out where any
 20 of the parts for my monitor came from.”); Lazerwitz Decl. ¶ 14, Ex. 12 (Deposition of
 21 Joseph Kovacevich, 72:8-74:10 (Feb. 16, 2009)); Lazerwitz Decl. ¶ 15, Ex. 13 (Deposition
 22 of Steven Martel, 36:18-37:4, 81:21-82:1 (May 1, 2009)) (“I have no knowledge of who
 23 manufactured [the panel] and presumed that they were all relatively the same.”); and
 24 Lazerwitz Decl. ¶ 21, Ex. 19 (Deposition of Allan Rotman, 45:3-47:8 (July 13, 2009))
 25 (“Rotman Dep.”), with Lazerwitz Decl. ¶ 7, Ex. 5 (Deposition of Gladys Baker, 74:25-
 26 75:16 (Jan. 29, 2009)) (“Baker Dep.”) (Quanta Display Inc. listed as manufacturer of the
 27 panel on Dell System Information sheet).

28 [REDACTED]

1 any such method would be extraordinarily complex and difficult to apply, as it would have to
 2 account for innumerable manufacturers, intermediaries, and variations in distribution channels.
 3 Snyder Decl. ¶ 35. Plaintiffs could not even try to show ascertainability on a product-by-
 4 product basis, because manufacturers of LCD Products often obtain LCD panels for the same
 5 model of product from a variety of manufacturers, some of which are not defendants. [REDACTED]

6 [REDACTED] Even panel manufacturers that are vertically
 7 integrated and make finished products source panels from other panel manufacturers. [REDACTED]

10 [REDACTED] 42

12 **IV. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO CERTIFY A**
NATIONWIDE INJUNCTIVE CLASS AND 23 STATEWIDE UNJUST
ENRICHMENT CLASSES UNDER RULE 23(B)(2)

14 Plaintiffs seek injunctive relief on behalf of a purported nationwide class under
 15 Rule 23(b)(2) for defendants' allegedly ongoing violations of the Sherman Act. Compl. ¶ 3.

24 For similar reasons, should the Court decide to exclude Foreign-Panel Product purchases
 25 from the class definition, plaintiffs will face an even greater challenge of ascertaining the
 26 class members by identifying which end-users bought Domestic-Panel Products. See
 27 Snyder Decl. ¶ 38; *supra* § Argument II.A.3.

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1 Plaintiffs also seek to certify separate statewide classes under Rule 23(b)(2) for their state-law
 2 unjust enrichment claims. Pls.' Mem. at 16. None of these classes should be certified under
 3 Rule 23(b)(2). First, plaintiffs lack standing to obtain injunctive relief, which is required to
 4 certify a Rule 23(b)(2) class, because they do not – and cannot – allege a threat of future injury
 5 from the alleged conspiracies. Second, because plaintiffs' monetary claims are not secondary to
 6 their injunctive relief claim, the Court should not certify the proposed unjust enrichment
 7 classes.

8 A. Plaintiffs Do Not Have Standing To Seek Injunctive Relief

9 This Court may award injunctive relief under the Clayton Act to protect against
 10 "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26; *Cargill, Inc. v.*
 11 *Monfort of Colo., Inc.*, 479 U.S. 104, 110-11 (1986). But the Court may not certify an
 12 injunctive class if the named plaintiffs do not have standing to seek an injunction under the
 13 Clayton Act. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). To have standing to seek injunctive
 14 relief under the Clayton Act, plaintiffs must show that they are currently "threatened . . . with
 15 antitrust injury." *Cargill*, 479 U.S. at 113. A "threatened injury" exists if there is "a significant
 16 threat of injury from an impending violation of the antitrust laws or from a contemporary
 17 violation likely to continue or recur." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football*
 18 *League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (concluding that the plaintiff failed to show
 19 "immediate threatened injury"). "Past exposure to illegal conduct does not in itself show a present
 20 case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present
 21 adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *In re New Motor Vehicles*
 22 *Canadian Export*, 522 F.3d at 13-16 (denying certification under Rule 23(b)(2) because, even if
 23 plaintiffs "had standing to seek injunctive relief at some time in the past," they no longer had
 24 standing because there was no ongoing conspiracy).

25 Plaintiffs lack standing to seek injunctive relief because they have not shown an
 26 imminent "threat of irreparable injury." *Hairston v. Pac.-10 Conference*, 893 F. Supp. 1485,
 27 1493 (W.D. Wash. 1994). While plaintiffs argue that an injunction requiring defendants to

1 “cease any anticompetitive conduct” is needed to stop defendants’ “ongoing” anticompetitive
 2 practices, Pls.’ Mem. at 14, plaintiffs, their expert, and the government agree that there has been
 3 no anticompetitive conduct since 2006. Plaintiffs’ operative complaint, filed in December
 4 2008, contains no substantive allegations of anticompetitive conduct taking place after 2006.
 5 Compl. ¶¶ 1, 15, 128, 141, 183-84.⁴³ Indeed, Dr. Netz affirmatively relies on the absence of a
 6 conspiracy during the post-2006 “competitive period” for the purpose of her price regression,
 7 which she could not do if there were ongoing anticompetitive activity after 2006. Netz Decl. at
 8 91-92.⁴⁴ Moreover, none of the plea agreements on which plaintiffs rely mentions
 9 anticompetitive conduct occurring after 2006. See Compl. ¶¶ 190-91. Finally, the
 10 government’s antitrust investigation of the LCD industry became public in December 2006. *Id.*
 11 ¶¶ 183-85. It is particularly improbable – and plaintiffs do not allege – that any anticompetitive
 12 conduct continued after the government’s investigation became public and certain defendants
 13 pleaded guilty and paid large fines.⁴⁵

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17 ⁴³ The assertion in plaintiffs’ request for injunctive relief that the conspiracy “continu[ed]
 18 through the filing of the Second Amended Complaint [in December 2008],” *id.* ¶ 251, is
 19 therefore inconsistent with the complaint’s substantive allegations. In addition, the
 20 complaint does not allege that plaintiffs intend to buy LCD Products. *In re New Motor*
Vehicles Canadian Export, 522 F.3d at 15 (emphasizing that plaintiffs’ failure to allege
 21 any intent to purchase the product at issue further weakened their claims of threatened
 22 future harm).

23 ⁴⁴ If the Court certifies plaintiffs’ injunctive class based on their assertion that the alleged
 24 conspiracy is “ongoing” today, then the Court should reject Dr. Netz’s report as it relies on
 25 the contrary assumption that data from “the period since 2006” was untainted by the
 26 alleged conspiracy. Compare Netz Decl. at 91-92, with Pls.’ Mem. at 14 and Compl. ¶
 27 251; *see supra* § Argument II.B.7.c.

28 ⁴⁵ For these same reasons, plaintiffs’ attempt to extend their Nationwide Class beyond the
 29 December 11, 2006, end date in their complaint to the present should be denied, as
 30 plaintiffs do not allege that any harm has arisen beyond that date. *See also infra* §
 31 Argument V.A.1 (plaintiffs cannot extend the class period of their class definition without
 32 the Court’s leave to amend their complaint).

1 B. The Court Should Deny Plaintiffs' Request To Certify State
2 Claims For Unjust Enrichment Under Rule 23(b)(2)

3 Plaintiffs assert without citation that their "state-law equitable restitutionary
4 claims are subject to Rule 23(b)(2) requirements." Pls.' Mem. at 16.⁴⁶ A claim for monetary
5 relief can be brought under Rule 23(b)(2) only if the monetary damages are secondary to a
6 primary claim for injunctive or declaratory relief. *Molski v. Gleich*, 318 F.3d 937, 949-50 &
7 n.14 (9th Cir. 2003); *In re Paxil Litig.*, 218 F.R.D. 242, 247 (C.D. Cal. 2003) ("Plaintiffs' claim
8 for restitution must be merely incidental to the claim for injunctive or declaratory relief.").⁴⁷
9 Here, plaintiffs' state-law unjust enrichment claims cannot be secondary to their injunctive
10 relief claims, because plaintiffs do not seek injunctive relief on behalf of any of the statewide
11 classes. Plaintiffs' injunctive relief claims are limited to their nationwide class. Compl. ¶ 255;
12 Pls.' Mem. at 2.

13 Nor can plaintiffs argue that the state-law unjust enrichment claims are
14 secondary to their claim for injunctive relief on behalf of the nationwide class. Even if such a

17 46 Plaintiffs assert that the Court should evaluate their proposed statewide unjust enrichment
18 claims using the same analysis as that used to assess their nationwide injunctive relief
19 claims. Pls. Mem. at 16. Accordingly, the Court should deny certification of the
20 statewide unjust enrichment classes for the same reasons it should refuse to certify the
nationwide injunctive class.

21 47 The Supreme Court has noted that there is "at least a substantial possibility" that actions
seeking monetary damages can be certified only under Rule 23(b)(3), which gives
plaintiffs the right to opt out and to receive notice. *Ticor Title Ins. Co. v. Brown*, 511 U.S.
117, 121 (1994). Accordingly, courts usually consider unjust enrichment claims under
Rule 23(b)(3), not Rule 23(b)(2). *See, e.g., Kelley v. Microsoft Corp.*, 251 F.R.D. 544,
559 (W.D. Wash. 2008); *Avritt v. Reliastar Life Ins. Co.*, No. 07-1817, 2009 WL 455808,
at *5 (D. Minn. Feb. 23, 2009). But here, plaintiffs do not ask the Court to evaluate their
unjust enrichment claims under Rule 23(b)(3), so the Court need not do so. In any event,
even if the Court were to evaluate plaintiffs' unjust enrichment classes under Rule
23(b)(3), certification of those classes should be denied for the same reasons discussed
above. *See* § Argument II.

1 comparison were permissible,⁴⁸ injunctive relief would not predominate over monetary
 2 recovery for the statewide class members. To determine whether claims for injunctive relief or
 3 damages predominate, the Court should “examine the specific facts and circumstances of each
 4 case” and determine the “intent of the plaintiffs in bringing the suit.” *See Molski*, 318 F.3d at
 5 950. “As part of this inquiry, the Court may ask whether a reasonable party would bring the
 6 suit to obtain the injunctive relief and whether the injunctive relief sought would be both
 7 reasonably necessary and appropriate were the party to succeed on the merits.” *In re Paxil*, 218
 8 F.R.D. at 247 (citing *Molski*, 318 F.3d at 950).⁴⁹ Here, a typical indirect purchaser would seek
 9 damages for his past purchase of an LCD Product and would not value injunctive relief over
 10 monetary recovery since most indirect purchasers do not buy LCD Products often.⁵⁰ Moreover,
 11 injunctive relief would not be “reasonably necessary and appropriate,” because, as explained
 12 above, there is no threat of future harm.

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⁴⁸ Plaintiffs have pursued their 23 statewide classes as separate classes, not as subclasses of the nationwide class. Accordingly, plaintiffs should not be permitted to impute claims in one class to other, separate classes.

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⁴⁹ Plaintiffs’ argument that their injunctive relief claims predominate over monetary damages claims because “the Nationwide Class [is] broader than the Indirect-Purchaser State Classes in terms of numerosity and geography, [and] the long-lasting effects of an injunction would far eclipse the effects of a damages awards” – does not address the *Molski* factors. *Compare* Pls.’ Mem. at 15, *with Molski*, 318 F.3d at 950.

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⁵⁰ *See, e.g.*, Rotman Dep. 59:24-60:8, July 13, 2009) (“Q. Did you consider – strike that. What would you like to gain from this lawsuit? A. I would like to gain damages. I would like to gain money for myself and the rest of the class that I represent. . . . Q. Anything else? A. No.”); Lazerwitz Decl. ¶ 22, Ex. 20 (Deposition of Joe Solo, 35:22-25 (Feb. 11, 2009)) (same); Flanagan Dep. 40:24-41:4 (“Q. Okay. What would you like to gain from this lawsuit? A. Damages. Q. And what do you mean by damages? A. The overpayment for the amount that I had to pay for my monitor.”); Lazerwitz Decl. ¶ 9, Ex. 7 (Deposition of William Fisher, 38:1-4 (Feb. 23, 2009)) (“Fisher Dep.”) (same); Lazerwitz Decl. ¶ 10, Ex. 8 (Deposition of Robert George, 54:23-55:1 (May 5, 2009)) (same); Lazerwitz Decl. ¶ 16, Ex. 14 (Deposition of John Martich, 48:22-23 (May 29, 2009)) (same).

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28

1 **V. NAMED PLAINTIFFS BAKER, FISHER, GRIFFITH, HANSEN, JOU,**
 2 **MURPHY, MULVEY, NORTHWAY, PAGUIRIGAN, SRIMOUNGCHANH,**
 3 **AND WATSON ARE INADEQUATE AND/OR ATYPICAL CLASS**
 4 **REPRESENTATIVES**

5 Under Rule 23, putative class representatives must demonstrate that they (i) are
 6 able to “fairly and adequately protect the interests of the class,” Fed. R. Civ. P. 23(a)(4), and (ii)
 7 have claims that are “typical” of those of absent class members. Fed. R. Civ. P. 23(a)(3). If “it
 8 is predictable that a major focus of the litigation will be on a defense unique’ to the named
 9 plaintiff, that plaintiff will not satisfy the typicality requirement of Rule 23(a).” *Jordan*, 2009
 10 WL 192888, at *5 (quoting *Hanon*, 976 F.2d at 509). Named plaintiffs’ need to litigate unique
 11 defenses creates “a significant danger that absent Class members would suffer by the time and
 12 preoccupation [that named plaintiffs] would have to devote to the defenses unique to them.”
Arabian v. Sony Elecs. Inc., No. 05-1741, 2007 WL 627977, at *5 (S.D. Cal. Feb. 22, 2007).

13 Here, at least 11 of the 38 named plaintiffs are not suited to represent their
 14 respective proposed classes. First, plaintiffs Kou Srimoungchanh, William Fisher, Judy
 15 Griffith, Chad Hansen, Gladys Baker, and Ling Hahn Jou are atypical plaintiffs because they
 16 are not even members of the proposed class and are subject to unique standing defenses: Mr.
 17 Fisher, Ms. Griffith, and Mr. Hansen did not purchase their products during the relevant class
 18 period; Mr. Srimoungchanh did not purchase the product on which he bases his claim; Ms.
 19 Baker bought a product containing an LCD panel manufactured by a company not named as a
 20 defendant; and she, Mr. Paguirigan, and Ms. Jou do not fulfill the residency requirement of the
 21 proposed class definition. Second, plaintiffs Christopher Murphy, Martha Mulvey, Ben
 22 Northway, and Robert Watson have close familial or business relationships with their counsel
 23 and lack the fundamental independence required to represent the absent class members
 24 adequately.

25 The following named plaintiffs are the only remaining proposed representatives
 26 of their respective Indirect-Purchaser State Class and therefore the listed classes cannot be
 27
 28

1 certified.⁵¹ *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007)
 2 (dismissing indirect purchaser claims for states where only named plaintiffs lacked standing to
 3 bring claims).

Indirect Purchaser State Class	Sole Representative(s) Who Are Inadequate/Atypical
Iowa	Mr. Northway
Massachusetts	Mr. Murphy
Michigan	Ms. Baker, Ms. Jou, Ms. Griffith
Minnesota	Ms. Mulvey
Vermont	Mr. Watson

9 A. **Ms. Baker, Mr. Fisher, Ms. Griffith, Mr. Hansen, Ms. Jou, Mr.**
 10 **Paguirigan, And Mr. Srimoungchanh Are Atypical And Inadequate**
 11 **Because They Are Not Class Members Under The Proposed Class**
 12 **Definition And Are Subject To Unique Standing Defenses**

13 “A litigant must be a member of the class which he or she seeks to represent at
 14 the time the class action is certified by the district court.” *Sosna*, 419 U.S. at 403.
 15 Furthermore, an individual without standing cannot represent a class. *Prado-Steiman v. Bush*,
 16 221 F.3d 1266, 1279 (11th Cir. 2000); *In re Quarterdeck Office Sys. Sec. Litig.*, No. CV 92-
 17 3970, 1993 WL 623310, at *3 (C.D. Cal. Sept. 30, 1993). The named plaintiff “must possess
 18 the same interest and suffer the same injury shared by all members of the class he represents.”
 19 *Jordan*, 2009 WL 192888, at *3. Even if this Court were unwilling to hold now that some
 20 plaintiffs lack standing, the existence of a material dispute about their right to recovery subjects
 21 them to unique defenses that make them atypical. See *In re Quarterdeck*, 1993 WL 623310, at
 22 *2-*3.

23
 24
 25 51 See Notice of Mot. & Mot. of Indirect-Purchaser Pls. for Class Cert. at 9-10, Dkt. No.
 26 1023 (filed June 2, 2009). This section also discusses the remaining named plaintiffs who
 27 are atypical or inadequate, but who are not the sole representatives of their proposed
 28 classes.

1. Purchases Outside Class And Alleged Conspiracy Period

Mr. Fisher, Ms. Griffith, and Mr. Hansen purchased their LCD Products outside the class period. “[F]or Plaintiffs to possess standing to act as class representatives, Plaintiffs must adduce evidence showing they purchased [the relevant products] from the named Defendants or their co-conspirators during the alleged conspiracy period.” *In re Polypropylene Carpet*, 178 F.R.D. at 609. Moreover, “purchasers who bought [the relevant products] . . . outside the class period, are subject to unique defenses, and therefore cannot satisfy the typicality requirement.” *In re AM Int’l, Inc. Sec. Litig.*, 108 F.R.D. 190, 194 (S.D.N.Y. 1985).

According to the complaint, the class period ended on December 11, 2006.

10 Compl. ¶15.52 Plaintiffs Fisher, Griffith, and Hansen all purchased the products on which they
11 base their claims after December 11, 2006: Mr. Fisher on February 10, 2007; Ms. Griffith on
12 December 16, 2006; and Mr. Hansen on December 15, 2006, December 29, 2006, and
13 December 31, 2006. Fisher Dep. 66:13-15; Lazerwitz Decl. ¶ 11, Ex. 9 (Deposition of Judith
14 Griffith, 34:1-12 (Feb 19, 2009)); Lazerwitz Decl. ¶ 28, Ex. 26 (Pl. Chad Hansen's First Am.
15 Objections and Resp. to Def. LG Display America Inc.'s First Set of Interrogs., at 7 (June 11,
16 2009)).⁵³

52 Plaintiffs' unexplained assertion in their class certification brief that the class period
20 extends for an additional 20 days, Pls.' Mem. at 2, does not change the analysis. If
21 plaintiffs want to change the class period, they must seek leave to amend their complaint.
22 See *Jordan*, 2009 WL 192888, at *6 ("Should plaintiff wish to redefine the putative class,
23 he may seek leave to file an amended complaint."); *Pierce v. Novastar Mortgage Inc.*, 489
24 F. Supp. 2d 1206, 1215 (W.D. Wash. 2007) (declining "to consider whether to redefine the
25 class because this request . . . was not properly filed as a motion [to amend the complaint
and was] not timely"). Certification of a class period beyond December 11, 2006, or
consideration of purchases beyond that date, is therefore improper because plaintiffs have
not sought leave to amend their complaint.

²⁶ 53 Chad Hansen claims to have made a fourth purchase sometime in 2000, but has provided no evidence to document his purchase. Hansen Interrog. Resp. at 7.

1 2. Purchase Not Made By Plaintiff

2 Mr. Srimoungchanh did not purchase the only product on which he bases his
 3 claim. Instead, First Secure Data, a limited liability corporation that Mr. Srimoungchanh owns,
 4 made the purchase because the retailer would only sell to a company. Lazerwitz Decl. ¶ 23, Ex.
 5 21 (Deposition of Kou Srimoungchanh, 179:7-18, 211:17-20 (Feb. 26, 2009)). As Mr.
 6 Srimoungchanh's attorney conceded, "First Secure Data, any purchases that may have been
 7 made on behalf of that company are not part of this litigation." *Id.* at 209:11-13. As a result,
 8 Mr. Srimoungchanh is not a member of the proposed class, nor does he have standing to sue
 9 defendants.⁵⁴

10 3. Purchase Of Panel Not Made By Defendants

11 As complex as the alleged conspiracies may be, plaintiffs' claims extend only to
 12 "LCD panels incorporated in televisions, monitors, and/or notebook computers, from one or
 13 more of the named Defendants." Pls.' Mem. at 2-3. Demonstrating the near impossibility of
 14 ascertaining what purchases belong in the class, *see supra* § Argument III, the only plaintiff
 15 able to identify the manufacturer of the LCD panel incorporated into her LCD Product bought a
 16 Dell monitor containing a panel manufactured by Quanta Display, a non-defendant not alleged
 17 to have fixed prices. Baker Dep. 74:25-75:16.⁵⁵ Not having made a qualifying purchase, Ms.
 18 Baker cannot represent those who did.

19
 20 54 Nor could plaintiffs substitute First Secure Data for Mr. Srimoungchanh, as their proposed
 21 class definition only includes entities that purchased products "for their own use." Pls.
 22 Mem. at 2-3. Because First Secure Data purchased the product for Mr. Srimoungchanh's
 use and not for its own use, First Secure Data is not a class member.

23 55 Quanta Display is not listed as a defendant. *See* Compl. ¶¶ 67-96. Nor do plaintiffs allege
 24 that Quanta Display was a coconspirator or participated in any anticompetitive agreement.
 25 *See supra* note 18. Ms. Baker bought the Dell computer in November 2003, Lazerwitz
 26 Decl. ¶ 27, Ex. 25 (Pl. Gladys Baker's Objections & Resps. to Def. LG Display America,
 Inc.'s First Set of Interrogs., at 6 (Sept. 29, 2008)), well before AUO acquired Quanta
 Display. Thus, there is no allegation that downstream purchasers of Quanta Display's
 products paid any overcharge stemming from the putative conspiracies.

4. Non-Resident Plaintiffs

2 Ms. Baker, Ms. Jou, and Mr. Paguirigan are not class members because they do
3 not satisfy the residency requirement of the proposed class definition. The class includes “[a]ll
4 persons and entities residing in the [Indirect Purchaser State] as of the date notice is first
5 published, who indirectly purchased in [Indirect Purchaser State].” Pls.’ Mem. at 2. In other
6 words, the class member must currently reside in the state in which she bought the product at
7 issue. Ms. Baker seeks to represent a class in Michigan, but currently resides in Florida. Baker
8 Dep. 6:15-18, 13:4-14:21, 19:12-18.⁵⁶ Ms. Jou also seeks to represent a class in Michigan, but
9 has lived in China for the last year. Lazerwitz Decl. ¶ 13, Ex. 11 (Deposition of Ling-Hahn
10 Jou, 10:16-11:9 (June 23, 2009)). Mr. Paguirigan seeks to represent a class in Wisconsin, but
11 currently resides in Washington. Paguirigan Dep. 11:23-12:24, 13:10-25.⁵⁷

B. Ms. Mulvey, Mr. Murphy, Mr. Northway, And Mr. Watson Are Compromised By Family Or Business Relationships With Counsel That Make Them Inadequate Representatives

14 Four named plaintiffs' conflicting close business and family relationships with
15 counsel compromise their ability to represent the class. A representative plaintiff must be free
16 of conflicts of interest with other class members and likely to "prosecute the action vigorously
17 on behalf of the class." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). A putative
18 class representative with a close business relationship with her counsel has a strong incentive to
19 value her attorney's financial recovery above the interests of the class that she purportedly

56 Additionally, Ms. Baker has read none of the documents related to the case and could not
21 even remember whether she had seen her own complaint. *Id.* 47:3-25. A named plaintiff's
22 failure or inability to oversee the litigation can be an independent reason to deny
23 certification. *See, e.g., Burkhalter*, 141 F.R.D. at 153 ("[A] party who is not familiar with
24 basic elements of its claim is not considered to be an adequate representative for the class
because there is no sense that there is an actual party behind counsel's prosecution of the
action.").

57 Like Ms. Baker, Mr. Paguirigan could not recall whether he had read or even seen the initial
25 complaint before it was filed, nor could he recall reading the consolidated amended complaint
26 except to prepare for his own deposition. *Id.* 91:1-25, 92:1-14, 105:1-19. For this reason,
too, Mr. Paguirigan is an inadequate representative.

1 represents. *See, e.g., London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003)
 2 (attorney's stockbroker was an inadequate representative); *Kramer v. Scientific Control Corp.*,
 3 534 F.2d 1085, 1093 (3d Cir. 1976) (shared office space with attorney); *Serna v. Big A Drug*
 4 *Stores, Inc.*, No. 07-0276, 2007 U.S. Dist. LEXIS 82023, at *6-7 (C.D. Cal. Oct. 9, 2007)
 5 (employee of attorney); *Sipper v. Capital One Bank*, No. 01-9547, 2002 WL 398769, at *4
 6 (C.D. Cal. Feb. 28, 2002) (business partner of attorney). Similarly, familial connections
 7 undermine the independence required of an adequate class representative. *See, e.g., Mowry v.*
 8 *JP Morgan Chase Bank, N.A.*, No. 06-4312, 2007 WL 1772142, at *4 (N.D. Ill. June 19, 2007)
 9 (close friendship between attorney and putative representative precluded certification “[e]ven
 10 though the relationship . . . does not rise to the level of a familial relationship”); *In re Microsoft*
 11 *Corp. Antitrust Litig.*, 214 F.R.D. 371, 374 (D. Md. 2003) (holding that sister-in-law of attorney
 12 is not an adequate representative). The risks of conflict are especially pressing where, as here,
 13 attorneys' fees are likely to dwarf any individual plaintiff's recovery. *Susman v. Lincoln Am.*
 14 *Corp.*, 561 F.2d 86, 91 (7th Cir. 1977).

15 At a minimum, at least four named putative class representatives lack the
 16 independence required to protect the interests of the absent class members:

- 17 □ Ben Northway's employment by his class counsel as a systems
 18 administrator provides his sole source of income. Lazerwitz Decl. ¶ 19, Ex.
 19 17 (Deposition of Ben Northway, 14:11-15:18 (Feb. 13, 2009)). Mr.
 20 Northway admitted that he wanted to see his employer maximize its
 21 revenue from this case. *Id.* at 19:22-20:7. Dependent on his lawyers for his
 22 entire income, Mr. Northway cannot be expected to act independently of
 23 them.
- 24 □ Robert Watson's class counsel is a significant customer of Watson's
 25 landscaping design business. Lazerwitz Decl. ¶ 25, Ex. 23 (Deposition of
 26 Robert Watson, 16:13-17:18; 17:25-18:25 (Mar. 6, 2009)). Mr. Watson has
 27 earned around \$2,000 since the beginning of this litigation on services

provided to his counsel and his counsel's law firm. *Id.* at 18:2-15. Mr. Watson is also seeking to be a class representative in two other class actions – in all cases, represented by the same counsel. *Id.* at 16:13-21.

- Christopher Murphy’s counsel is his brother-in-law. Lazerwitz Decl. ¶ 18, Ex. 16 (Deposition of Christopher Murphy, 2:3-9; 69:7-19 (Feb. 9, 2009)). Mr. Murphy’s brother-in-law also represents him in *In re Vitamin C Antitrust Litigation*. *Id.* at 66:21-67:4; 69:7-19.
 - Martha Mulvey is represented by her nephew. Lazerwitz Decl. ¶ 17, Ex. 15 (Deposition of Martha Mulvey, 11:4-13 (Feb 16, 2009)). Ms. Mulvey admitted during her deposition that she offered to be a class representative in case her nephew needed “someone from the State of Minnesota.” *Id.* at 19:11-20:3. Ms. Mulvey’s nephew also represents her in *In re Flash Memory Antitrust Litigation*. *Id.* at 19:2-6. Her abdication to counsel is confirmed by her failure to read any part of the consolidated amended complaint except its listing of attorneys, *id.* at 88:1-20, and her inability to define such terms as “class action,” *id.* at 29:4-6, “class representative,” *id.* at 36:1-2, or “overcharge,” *id.* at 109:4-12.

CONCLUSION

19 For the foregoing reasons, the Court should deny plaintiffs' motion for class
20 certification under Rule 23 and require that plaintiffs amend their complaint "to eliminate
21 allegations about representation of absent persons" under Rule 23(d)(1)(D).

22 | DATED: August 10, 2009

By: /s/ Michael R. Lazerwitz
Michael R. Lazerwitz (*pro hac vice*)
Jeremy J. Calsyn (State Bar No. 205062)
Lee F. Berger (State Bar No. 222756)
CLEARY GOTTLIEB STEEN &
HAMILTON LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006

1 (202) 974-1500 (Phone)
2 (202) 974-1999 (Facsimile)
mlazerwitz@cgsh.com

3 Attorneys for Defendants LG Display Co.,
4 Ltd. and LG Display America, Inc.

5 By: /s/ John M. Grenfell
John M. Grenfell (State Bar No. 88500)
6 PILLSBURY WINTHROP SHAW
PITTMAN LLP
7 50 Fremont Street
San Francisco, CA 94105
8 (415) 983-1000 (Phone)
(415) 983-1200 (Fax)

By: /s/ Kent M. Roger
Kent M. Roger (State Bar No. 95987)
MORGAN, LEWIS & BOCKIUS LLP
One Market
Spear Street Tower
San Francisco, CA 94105
(415) 442-1140 (Phone)
(415) 442-1001 (Fax)

9 Attorneys for Defendants Sharp
10 Corporation and Sharp Electronics
Corporation

Attorneys for Defendants Hitachi Electronic
Devices (USA), Inc., Hitachi, Ltd., and
Hitachi Displays, Ltd.

12 By: /s/ Steven F. Cherry
Steven F. Cherry (*pro hac vice*)
13 WILMER CUTLER PICKERING HALE
AND DORR LLP
14 1875 Pennsylvania Ave., NW
Washington, DC 20006
15 (202) 663-6000 (Phone)
(202) 663-6363 (Fax)

By: /s/ James L. McGinnis
James L. McGinnis (State Bar No. 95788)
SHEPPARD MULLIN RICHTER &
HAMPTON LLP
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
(415) 434-9100 (Phone)
(415) 434-3947 (Fax)

16 Attorneys for Defendants Chi Mei
17 Optoelectronics Corp., Chi Mei
Corporation, Chi Mei Optoelectronics
18 USA, Inc., CMO Japan Co., Ltd., Nexgen
Mediatech Inc. and Nexgen
19 Mediatech U.S.A., Inc.

Attorneys for Defendants Samsung
Electronics America, Inc., Samsung
Semiconductor, Inc. and Samsung Electronics
Co., Ltd.

20 By: /s/ Hugh F. Bangasser
Hugh F. Bangasser (*pro hac vice*)
21 K&L GATES LLP
22 925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
23 (206) 623-7380 (Phone)
(206) 623-7022 (Fax)

By: /s/ Wayne A. Cross
Wayne A. Cross (*pro hac vice*)
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200 (Phone)
(212) 354-8113 (Fax)

24 Attorneys for Hannstar Display Corporation

Attorneys for Defendants Toshiba America
Electronic Components, Inc., Toshiba
America Information Systems, Inc., Toshiba
Corporation, and Toshiba Matsushita Display
Technology Co., Ltd.

1 By: /s/ Christopher Nedeau
2 Christopher Nedeau
3 NOSSAMAN LLP
4 50 California St., 34th Floor
5 San Francisco, CA 94111
6 (415) 398-3600 (Phone)
7 (415) 398-2438 (Facsimile)

8 Attorneys for Defendants AU Optronics
9 Corporation and AU Optronics Corporation America

10 With the Reservation of All Rights and Defenses.

11 Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this
12 document has been obtained from Christopher Nedeau; Steven F. Cherry; Hugh F. Bangasser;
13 Kent M. Roger; John M. Grenfell; James L. McGinnis; and Wayne Cross.

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